



No. 13

---

In the Supreme Court of the United States

OCTOBER TERM, 1944

ANTHONY CRAMER, PETITIONER

UNITED STATES OF AMERICA

---

WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE SECOND CIRCUIT

---

APPENDICES TO BRIEF FOR THE UNITED STATES ON  
REARGUMENT

---

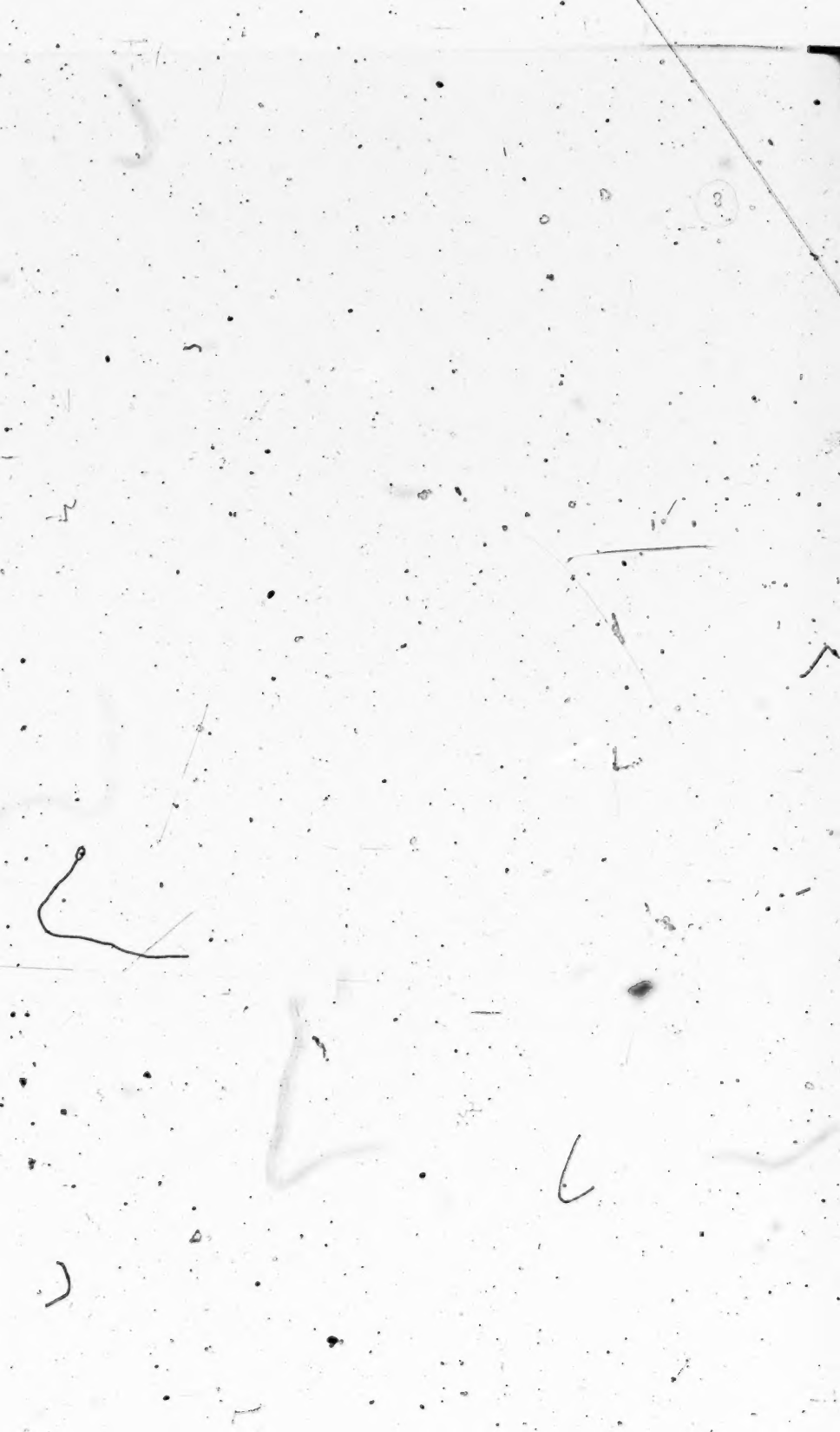




# INDEX

	Page
Appendix A—Civil and Canon Law Materials.....	1
I. The Crime of High Treason from the Romans to the Second Half of the 18th Century.....	1
II. Treasonable Crimes under the Criminal Codes of Con- tinental Europe.....	20
III. The Two-Witness Requirement in Canon Law.....	40
Appendix B—Anglo-American Materials.....	45
Introduction and Bibliographical Note.....	45
I. Treason in England.....	54
1. Treatises.....	54
(a) Early English Treatises.....	54
(b) Treatises Published in the 18th Cen- tury.....	73
(c) Treatises Published in the 19th and 20th Centuries.....	104
2. Statutory Evidence of English Policy Regard- ing Treason.....	117
3. English Case Law Prior to 1790.....	133
II. Treason in America.....	170
1. Treason Down to the Constitution.....	170
(a) Prior to the Revolution.....	170
(b) The Revolution—1775-1783.....	204
(c) The Constitution.....	249
2. Treason Under the Constitution.....	287

(I)



## FOREWORD

The following appendices have been prepared at the request of the Solicitor General. The authors of the appendices were requested to avoid argumentative support of any particular position, and to select material for inclusion or exclusion solely on the basis of its reliability and its relevance to the questions under review by the Court. The appendices are submitted to the Court in the belief that they constitute a fair, dispassionate, and informative analysis of the law of treason; but the Government does not in any way assume responsibility for, or necessarily agree with, the inferences drawn or the conclusions expressed by the authors.

Parts I and II of Appendix A, dealing with treason in civil law, were prepared, respectively, by Dr. Elio Gianturco, Research Assistant to the Foreign Law Section of the Law Library of Congress, and Dr. V. Gsovski, Chief of the Foreign Law Section of the Law Library of Congress. Part III of Appendix A, dealing with the two-witness requirement in canon law, was prepared by Dr. Stephan G. Kuttner, Professor of the History of Canon Law, The Catholic University of America, and Honorary Consultant in Canon Law to the Library of Congress.

Appendix B, dealing with the history of treason in English and American law, was, with the exception of the section dealing with English case

law prior to 1790, prepared by Willard Hurst, on leave as Associate Professor of Law, University of Wisconsin, whose services were made available through the courtesy of the Navy Department. The section on English case law prior to 1790, although revised and edited by Professor Hurst, was primarily prepared by attorneys on the staff of the Department of Justice.

The preparation of the appendices was made possible by the courtesy and cooperation of Professor Eldon R. James, Law Librarian of Congress, who freely made available both the facilities of the Library and the extremely valuable services of many members of its staff.

8

## APPENDIX A

### CIVIL AND CANON LAW MATERIALS

#### I

#### THE CRIME OF HIGH TREASON FROM THE ROMANS TO THE SECOND HALF OF THE 18TH CENTURY\*

In determining the attitude of Roman law toward high treason—*perduellio*, *laesa majestas*—it is naturally necessary to keep in mind that such attitude underwent change during the various epochs of Roman history. According to the state-form, content and scope of high treason vary. During the early patrician and regal period, the stern character of the Roman state, uninterruptedly fighting and unceasingly menaced by war, was pre-eminently unfavorable to any attempt directed at mitigating the harsh punishment attached to crimes like the *perduellio* which the Roman polity considered as nefarious breaches of the "quiritarian" religion. During the republican age, as long as political liberty buttressed civil liberty, the number of the categories of crime which came under the designation of *laesa majestas*, high treason, did not exceed certain natural and reasonable bounds. It was Sulla (138-78, B. C.), who, as a leader of the aristocratic reaction, having become dictator, was the

---

\*Prepared by Dr. Elio Gianturco, Research Assistant,  
Foreign Law Section, Law Library of Congress.

first to enlarge those bounds by issuing the *lex Cornelia de maiestate* (80 or 81 B. C.).<sup>1</sup> Under this law, the sole object of which was the establishment of tyranny, not only light crimes, but a simple negligence, a purely casual remark, were sufficient to bring about charges of *laesa maiestas*. As the law granted complete immunity to calumniators, rumor reigned unchecked and detraction flourished; it would be unthinkable, under such conditions, to expect the law, defeating its own purpose, to establish distinctions between intent and perpetration in cases of *laesa maiestas*.

It was a currently recognized principle of Roman law that, in case of ordinary offenses, no one could be punished for merely having entertained the thought of committing a crime: "*cogitationis poenam nemo patitur*"; stated Ulpian (*Digest*, Book 48, title 19, fragment 18.) But the rule was not applicable in cases of *laesa maiestas*. However, the Roman jurists felt this derogation from the principle "*cogitationis poenam nemo patitur*" to be against the dictates of reason; and they expressly pointed out that its recognition as a criterion of adjudication was ~~due~~ exclusively to reasons of political expediency. (See *Digest*, Book I, title 16, fragment 3). "Public" criminal law, in Rome, was never treated by jurists in a systematic fashion.<sup>2</sup>

In so far as high treason is concerned, the distinction, made today, in each crime, of four ele-

<sup>1</sup> At the time of the *lex Cornelia*, the concept of *perduellio* was still extant; it became obsolete through Caesar's *lex Julia de vi et maiestate*.

<sup>2</sup> Sources, in the *Corpus Iuris*, of provisions concerning high treason: *Digest*, Book 48, 4; *Codex*, 9, 8; and *passim*.

ments, the first of a subjective, the remaining ones of an objective character—the distinction, that is, between mere intention, preparatory acts, attempt, and consummation—was not drawn and far less practiced by the Romans. Roman law, in cases of high treason, does not differentiate attempt from consummation, preparation from perpetration. It has been remarked, however, that this is not a singularity of the crime of high treason, inasmuch as, in all *delicta publica*, no differentiation whatever was made between those aspects. In the domain of the *delicta privata*, at least three elements (intention, attempt, consummation) had been recognized and singled out by individual jurists, and in regard to particular crimes. These jurists emphasize the distinction between *voluntas sceleris*, *affectus*, (intent), on one side, and *effectus* (consummation) on the other; they contrast attempt with consummation (*conatus—effectus*), *injuria cœpta* with *injuria consummata*. But in public law distinctions were utterly disregarded, and no attempt was ever made to discriminate preparatory acts from attempt, inception from performance. Next in importance, after the *lex Cornelia*, is the *lex Julia de vi et majestate*, (46 B. C.) introduced by Caesar, and which forms the basis of all other laws *de majestate* issued during the imperial period. During the period of Sulla's domination and during the principate, when the pressure of despotism became more and more intense, theoretical speculations aiming at a separation of attempt from performance in *delicta publica* would have been entirely devoid of any bearing on practice.



The enactments which followed the *lex Julia*, i. e., the laws of Augustus, Tiberius, Caligula and Nero, give us, in intensified progression, a shocking picture of the lengths to which imperial perversity carried the concept of *laesa majestas*. According to Tacitus, the charge of high treason was used as *omnium accusationum complementum* (Annals, III, 38). In his biography of Tiberius, Suetonius relates that the fact of having flogged a slave before a statue of the emperor, or of having changed one's clothes before it, or of having worn a ring bearing the ruler's likeness to a necessary or a house of ill-repute was accounted sufficient cause for capital punishment.

According to Pliny, the accusation of *laesa majestas* is one that can always be leveled against any person: it is the crime of those who are innocent of any crime. It was only transiently that, due to the great personality of a single ruler, as was the case with Nerva, Trajan, Hadrian, Antoninus Pius and Marcus Aurelius, and—in later times—with Alexander Severus and Theodosius—a stop was put to these aberrations. Even “philosophically trained” individual rulers like Julian showed themselves to be no better than the common run in this respect. Under Gratian and Valentinian things came to such a pass that crimes which had absolutely nothing to do with *laesa majestas*, such as poisoning, rape, adultery, etc., were viewed as falling within the category of high treason and punished as such. The climax was attained under Arcadius and Honorius. Their law on high treason, the atrociously harsh *lex Quisquis*, issued in 397, which appears not only in the

Theodosian and Justinian Codes, but also in Theodoric's Edict, in Canon Law, and the Golden Bull of Charles IV, established that bare intent is punishable.<sup>3</sup> Not only the direct perpetrators of crimes of *laesa majestas* should be punished, but their sons should be disinherited and their daughters should receive only the *quarta falcidia*.<sup>4</sup> A definition of *laesa majestas* was never given. Quintilian says: "It is extremely important to determine what constitutes a crime of high treason. Attempts to define it give rise to numberless cavillings." (*Institutiones oratoriae*, Book VII, Chap. 4). No Roman jurist or legislator ever undertook to give a specific and complete list of all the offenses constituting high treason. During the late empire, rulers continued to follow the practice, adopted by their predecessors, of enlarging the compass of *laesa majestas*.

On the other hand, the principle, unconditionally valid in case of *delicta privata*, that no man becomes an accomplice to another person's crime merely by the fact that, although being able to prevent it, he failed to do so, seems to have been a ruling maxim in Roman public law as well. Some historians, however—Mommsen, for instance—dispute this point. At any rate, it is a fact that not even the *lex Quisquis* marks a divergence from that principle. It remained for later ages to give legislative sanction to the principle of "commissive omission," i. e., to establish a penalty for failure to disclose a crime of which

<sup>3</sup> Cod. Just. ibidem. "eadem enim severitate voluntatem sceleris qua effectum puniri jura voluerunt."

<sup>4</sup> Cod. Just. 9, 8, 5.

one is cognizant and whose consummation is impending.<sup>5</sup>

In regard to crimes characterized by *dolus malus*—and high treason decidedly belongs to this category—apparently no effort was made, prior to the fourteenth century, to construct a systematic theory of judicial decision based on the tripartition, with which we moderns are so familiar: intent, attempt, consummation. Gandinus. (Alberto de Gandino) seems to have been the first deliberately to undertake this task. In his treatise "*De maleficiis*" (composed between 1305 and 1310), (whose influence may be traced down to the sixteenth century, in the criminal legislation of Charles V), the *magnus practicus* wrote: "If someone conceives the intention [of perpetrating the offense], makes the attempt, and consummates the crime, he shall be punished: If he conceives the intention, and makes the attempt, but does not consummate the crime, a distinction must be drawn. Either he willed and [no obstacles standing in his way] could have been able [to commit the crime];<sup>6</sup> or he willed, and did not have the possibility [was prevented by outward circumstances] to commit the crime. In the first case, he may be pardoned for having willed. But if his

<sup>5</sup> Paulus, *Digest*, 50, 17, 109: "no punishment shall be inflicted on the individual who, although being able to prevent crime, failed to do so." It may be added that in late Roman legislation, failure to consummate the crime (in case of ordinary offenses) is, sometimes, mentioned as an extenuating circumstance.

<sup>6</sup> In Roman republican times, this principle ("*an potuit facere*") must have played a definite role in judicial practice.

failure to commit the crime depends on the fact that outward circumstances not in his control prevented him, he shall be punished, since in crimes it is the intention of the doer, not the outcome that must be taken into account. If he had the intention to commit the crime, but did not consummate it, a distinction must be made. In case of ordinary crimes, he shall not be punished; but if it is a question of treason, he shall be visited with a penalty." (*De maleficiis, rubrica de poenis reorum*, n. 2). It is clear from this passage that although doctrinal elaboration of the principles of criminal law has made considerable progress since Roman times, the situation in the fourteenth century remains unchanged—the intent is still punishable—in respect to the crime of treason.

On the other hand, in the domain of ordinary crimes, the principle *aliud est crimen, aliud conatus* was definitely established in the sixteenth century by Andrea Alciati who in his commentary on fragment 53 of the title of the *Digest* entitled *De verborum significatione*, gave an admirable description of the *iter criminis*.

Down to the end of the seventeenth century, the punishability of mere thoughts in crimes of *laesa majestas* was a conviction unalterably voiced by most criminalists. Not a few writers contended, on the basis of the *lex Quisquis* of Arcadius and Honorius, that mere *cogitatio*, even when no act had resulted from it, was sufficient to bring about an indictment for treason. Clarus, Menochius, Farinacius were exceptions to this trend. As for deliberate intent—*affectus*—Clarus (1525–1575) says expressly that the *communis opinio* of his time

was that, although in other crimes the *affectus* is not punished unless the crime actually occurs; in cases of high treason, instead, mere intent renders liable to punishment, "even if the crime did not take place."

In so far as ordinary crimes are concerned, we may here remark in passing that juristic history evinces a continuous oscillation between different doctrines in regard to the attempt. There is no definite adoption of a final theory. The reason is that, whereas the concept of "consummation" is evident, that of "attempt" is extremely hard to determine.

In the case of *ordinary* crimes a decided forward stride toward the distinction, established in modern theory, between preparatory acts, attempt and consummation, was taken by Menochius (1532-1607). Analyzing the criminal process, Menochius clearly differentiates between (1) remote acts [we may term them ante-preparatory acts]; (2) proximate acts [these are what today we call preparatory acts]; (3) very proximate acts [acts in execution of the crime]. Given the trend of the common opinion of his age, Menochius' theory had no practical application in so far as acts of high treason were concerned. It is interesting however to observe that in the field of theory Menochius' distinction visibly underlies a basic pronouncement by perhaps the most famous of his successors, Farinacius. (1544-1618). "In cases of high treason, the attempt is punished, even if there was no consummation of the crime \* \* \* In such cases mere conspiracy, or mere intent and scheming, or preparatory acts

are punished with the same penalty as if the crime had been consummated." (Farinacius, Quaest. CXVI, par. IV.)

This passage of Farinacius is noteworthy as it shows that the modern theory regarding the steps of crime was already formed in the 16th century. Farinacius has a clear awareness of the distinction between "conspiracy" (which he calls *tractatus*), "intent" (*consilium*), "scheming" (*machinatio*), and "arranging means to be used in the perpetrating of the crime" (in the text: "*ordinatio*" which approximately corresponds to our "preparatory acts.") To all intents and purposes, such distinctions exercised absolutely no influence on practice in the domain of high treason.

In regard to the distinction between treason against the ruler and treason against the country, a distinction which is reflected in the German terms *Hochverrat* and *Landesverrat*, the earliest writer who clearly formulated the difference between the two types of crime was Angelo dei Gambiglioni in his *Tractatus de maleficiis* of 1472. That distinction plays a great role in the Prussian *Landrecht* of 1794, in the German Criminal Code of 1871, where that bipartition is basic, and in subsequent legislation and doctrine of the 19th century.

Not only was practice in Europe lagging far behind theory, but while, in the field of the syste-

---

Farinacius acknowledges the difficulty of giving an adequate definition of high treason; he states that it is wrong merely to enumerate, in a mechanical fashion, the characteristics of this crime, since a definition must be based on *genus proximum et differentiam specificam*.



matic treatment of ordinary crimes, writers were elaborating appropriate logical distinctions such as those just mentioned, absolutistic practice, signally in France, was reverting to the principles of Roman imperial despotism. The great French jurist Domat (1625-1696) informs us that "in cases of treason, intent to commit the crime, even when not followed by any execution and *even when manifested when such intent does no longer exist*, shall be visited with the same penalty as would have been attached to the crime actually consummated." (Domat, *Supplément au droit public*, Book III, title 2, art. 5). French law of the 17th century took for granted that even an abandoned criminal intent could be punished.

Despotic arbitrariness found a powerful ally in legislative disorder. France trailed considerably behind other European nations in the establishment of a code exclusively devoted to criminal law. It was not until October 6, 1791, during the French Revolution, that such a code was established. Prior to that time, legislative chaos prevailed. An outstanding 18th century jurist graphically describes it in the following terms: "all laws fight with each other in regard to pre-eminence, scope of jurisdiction, and content: Latin enactments are in opposition to French ordinances; old ordonnances with new edicts, edicts with declarations; and all of them together with the decisions of the courts. Such anarchy is enough to make the best legal mind dizzy."

The number of monographs dealing with atelapt which appeared in the 18th century is almost double that of those published in the 17th

century.<sup>8</sup> Apparently no investigations devoted solely to a treatment of the attempt in crimes of high treason appeared in the 18th century.

Montesquieu, in his *Esprit des Lois* (1748), Book XII, Chapters VII–XIII, XVI, XVII, takes up

<sup>8</sup> Here is a bibliographical listing by no means claiming completeness:

*17th Century Works:*

Hoyer, *Diatribae de conatus*. Lieseen, 1637.

Stok, *De conatu*. Marburg, 1639.

Dilherr, *De conatu poenam secundum naturae et voluntaria jura incurrente*. Alton, 1646.

Schlegel, *Disputa de conatu*. Jena, 1667.

Turcke, *De maleficiis coeptis*. Helms, 1680.

Sulzer, *De impunitate conatus in delictis*. Leipzig, 1688.

Passerino, *De occidente unum pro alio*. Palermo, 1693.

*18th Century Works:*

Mencken, L. *De impunitate conatus in delictis*. Leipzig, 1705.

Alers, *De poena cogitationum*. Bremen, 1713.

Starinski, *De poena conatus*. Regiom, 1714.

Vereick, *De cogitatione a poenis libera*. Leyden, 1730.

Tenzel, *De poena criminis imperfecti*. Erfurt, 1730.

Thomasius, *Problema juris criminalis an poena delicti ordinaria puniendus sit conatus proximus*. Leipzig, 1735.

Hertzog, *De crimine conatus*. Jena, 1735.

Brückner, *Dissertatio sistens crimen conatus*. Jena, 1735.

Jahn, *Harmonia juris naturalis et criminalis in doctrina de imputatione criminalis attentati*. Leipzig, 1736.

Bommel, *De cogitatione et conatus in poenalibus*. Lyons, 1766.

Hoffmann, *De initiis delictorum*, Tübingen, 1768.

Graaf, *De poena conatus*. Groningen, 1779.

Heldemann, *De conatu delinquendi*. Halle, 1799.



in detail the problem of *laesa majestas*. As the greatest representative of juridical liberalism in the 18th century, he wages a devastating fight against the whole absolutistic tradition of the punishment of "mere thoughts" (*nuda cogitatio*) in cases of high treason. A significant passage of *Esprit des Lois* (Book XII, Chap. XI) reads: "The laws do not take upon them to punish any other than *overt* acts." It is perhaps possible that this passage, in which Montesquieu seems to derive inspiration from the famous English statute of Edward III (1350) commented on by Coke in his *Third Institute* (Coke, *The Third Part of the Institute of Laws of England Covering High Treason and other Pleas of the Crown*, 5th ed., London, 1671, p. 12, 13), might have suggested to Benjamin Franklin the introduction into the American Constitution of Article III, Section 3: "Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court."

In regard to preparatory acts, during the Enlightenment period the *communis opinio* is that they should be punished. The authors of the 18th century, chief among them Montesquieu, as we saw, emphatically maintain that *mere thought* is not punishable—and this is a reaction against the cruel aberrations of absolutistic practice—but they do not try to draw a distinction between preparatory acts and attempt. Attempt, in their mind, includes the preparatory acts; and these

are to be punished by reason of their being constitutive elements of the attempt itself. The constantly recurring theme of the Enlightenment's opposition against absolutism is the emphasis on the distinction between the purely internal, cogitative aspect and the external spect, realized-by-the-attempt, of *lèse majesté*, but jurists of their period, in regard to this crime, do not advocate a distinction between attempt and consummation.

Montesquieu may again be quoted to illustrate this point:

Words carried into action assume the nature of that action. Thus a man who goes into a public market-place to incite the subjects to revolt, incurs the guilt of high treason, because the words are joined to the action and partake of its nature. It is not the words that are punished, but an action in which words are employed. (*Esprit des Lois*, Book XII, Chap. XII.)

The problem concerning the point at which the boundary-line between attempt and consummation in crimes of high treason should be drawn, falls, therefore, outside the conceptual interests of 18th century criminalists. (In the 19th century, agreement on general principles, on the part of doctrinal writers, did not prevent them from reaching diametrically opposite conclusions in so far as the problem of fixing the boundary-line between attempt and consummation is concerned.)

In general the 18th century reformers and writers on criminal law, beside combatting the tendency to punish mere thought, pressed for a

substantial reduction of the number of categories of crime which the concept of *lèse majesté* was employed to cover. Furthermore, those reformers and writers valiantly opposed the vague, indeterminate character of the idea of *laesa majestas* in which they saw a fool of absolutistic arbitrariness, and urged legislators to adopt unambiguous, clearly defined formulations of actions which were to be construed as constituting crimes of high treason. Hence, a characteristic feature of the 18th century technical literature on criminal law is that, in decided contrast to preceding ages, it pays close attention to classification of the various types of high treason. The two best-known "practical" writers on criminal law of 18th century France, Jousse and Muyart de Vouglans, both maintain that in cases of high treason, the attempt should be treated with equal severity as the fully consummated crime. Jousse (*Traité de la justice criminelle en France*, 1771, T. III, p. 697) states that in the prevailing practice of his time "the mere intent, whether manifested by witnesses or by the declaration of the culprit, was visited with punishment." In Jousse's view, the ignominious character of the crime of high treason consists "not so much in the performance as in the intent, machination and will, which constitute the consummation of the culprit's maliciousness and evil purpose."

Muyart de Vouglans, in his *Institutes au droit criminel* (Paris, 1747, p. 92) likewise points out that "according to the law, intent more than performance must be taken into account." The distinction, currently drawn in 18th century

France, between *conatus remotus* (preparatory acts) and *conatus proximus* (acts closest to consummation) in ordinary crimes, found no application in cases of high treason.

In Germany of the second half of the 18th century, the common opinion of the writers on criminal law is—in so far as the equal treatment of attempt and consummation in cases of high treason is concerned—identical with that of their French counterparts.

Let us now cast a brief glance over the principal legislations of the 18th century.

Whoever studies this period of legislative history cannot fail to be struck by the influence which theory exerted on practice. The doctrines of natural law, the contractual theory concerning the genesis of the state, were powerful instruments of institutional and intellectual transformation. A unified opinion as to the purpose of punishment was formed, and this opinion became basic to the progressive work of positive legislation.

The movement, as evinced by theory, was not reflected *at once* in practice. The formal date of inception of the Enlightenment period may be set at 1748 (publication of Montesquieu's *Esprit des Loix*) or, at the latest, 1764 (appearance of Beccaria's essay on *Crimes and punishments*). But before 1786 codifiers did not become fully aware of the fact that they were adopting a philosophi-

---

See for instance: Grolman, *Grundriss des Criminal Rechtswissenschaft*, paragraph 330; Klein, *Grundsätze des peinlichen Rechts*, par. 502; Martin, *Lehrbuch*, par. 208, note 13.

cally grounded basis in regard to the conception, function, and purpose of punishment.

The *Coder Juris Bavarici Criminalis* of 1751, and the *Constitutio Criminalis Theresiana* of 1786 must be classed, in view of the harsh penalties which they contain, among the vestigial structures of a slowly obsolescent past.

Article 61, paragraph 2, of the *Constitutio criminalis Theresiana* deals with the *crimen laesae majestatis* in the first degree, and establishes that, in this crime, guilt is incurred through *sola voluntas* (bare intent), through the attempt, through misprision, and failure to prevent the crime. The text reads:

Charge for this offense is incurred not only through the perpetration of the crime, but also through the intent to commit such an abominable misdeed, whenever evidence of intent is given in the forms prescribed by law. Charge is, all the more, incurred whenever an attempt, or preparations for that crime have actually taken place. Likewise, if an individual, who knew about that criminal intent and highly dangerous preparations, failed to report them at once and to the proper authority, while being in a position to do so, he shall be charged with the crime. If, being able to prevent the crime he failed to do so, he shall likewise be held guilty of the crime.

A striking contrast to the *Theresiana* is provided by the Code of Penal laws issued by Grand-duke Pietro Leopoldo of Tuscany in 1786. This "Reform of the criminal law of Tuscany" is easily the most notable expression of the advanced liberal spirit of the 18th century. The Grand

Duke of Tuscany was not only a fervent admirer of Montesquieu, Beccaria, Filangieri, and other reforming pioneers, but made a concrete effort to embody their ideas in positive legislation. He went farthest on the road of reform than any contemporary European ruler. His work, in the opinion of many historians, deserves to be called one of the most splendid legislative monuments of the age of the Enlightenment, the most precious legacy that criminal legislation of the 18th century left to the 19th. In punishment, remarks Calisse, [the Grand Duke of Tuscany] did not see, as did most, merely a means of social defense, but aimed to use it as a satisfaction for private and public injury, a corrective of the criminal, and a public example. The Tuscan reform was inspired by the rational conviction that the mitigation of punishment, joined with the closest vigilance in order to forestall crime, quickly expedited trials, and unfailing penalties are bound to bring about a diminution rather than an increase of crime. Pietro Leopoldo undertook to change the penal system of Tuscany from the roots. In so far as *lèse majesté* is concerned, he completely abolished this type of crime, which has no place in his code. Article 62 of the "Reform of the criminal law of Tuscany" states:

We order that all the laws which, through abuse, have constituted, extended, and multiplied the crimes called *lèse majesté*, as having their principal source in the despotism of the Roman empire, and as not being admissible in any well-regulated society, be abrogated and abolished. And to remove this abuse; abolishing all



the crimes which are thus specially entitled *lèse majesté*; abolishing, as has been already prescribed in a general way, in the twenty-seventh article, all privileged or presumptive proofs, even in cases of similar crimes; and entirely abolishing the guilt of all those actions which are not criminal in themselves; but are only become so in these cases by the law; we order that all others, such as robberies, violence excepted, be considered in their respective classes as ordinary transgressions, more or less qualified according to the circumstances, and be punished as such, without considering the aggravation which, under the pretext of *lèse majesté*, or high treason, has been annexed by the law.

And it is consequently our will, that all violence in whatever way they may have been committed, or attempts against the security, liberty, and tranquillity of the government, without any exception, shall be considered in the class of public violences, and as such shall be liable to any degree of punishment, not excepting the last, which the greater or less atrociousness of the violence employed may require.

Unfortunately, the Grand Duke of Tuscany's reform was not long-lived. "He began to tear down his own edifice by re-establishing in 1790 the death penalty [which he had abolished]." The reaction became still more marked under the government of his successor, Ferdinand III.

The code of Frederick of Prussia, the *Allgemeine Landrecht* of 1794 (which deals with criminal law in articles 1577 ff., title 20, Part II), contains clear definitions of what constitutes high treason, adopts the bi-partition *Hochverrat*-

Landesverrat, but equates attempt and consummation in cases of high treason. It does not, therefore, depart from the common pattern of 18th century criminal codes, although it provides that a lesser penalty than that attached to consummation shall be incurred by the attempt.

The criminal reform brought about by Pietro Leopoldo is almost contemporary with the codification of his brother, Joseph II of Austria who, under the influence of Sonnenfels issued in 1787 his *Josephina*, or, as the official title reads, "A general law concerning crimes and their punishment." The *Josephina* has been termed a typical product of the Enlightenment. Although it marks a considerable advance over the *Constitutio Criminalis Theresiana*, it represents, on the other hand, a distinct retrogression in comparison with the criminal code of Tuscany. This is evidenced in particular by the fact that, in the *Josephina*, criminal attempt is equated with consummation, even in ordinary crimes. Paragraph 9, Part One, states:

Although the thought [of committing a crime] and an inwardly evil intent alone cannot be considered as criminal offenses; it is not, nevertheless, necessary that the evil deed be actually consummated. The mere attempt at crime is a crime, as soon as the delinquent actually makes ready to perform it, and manifest his intention through external indicia and through an act. It does not matter that the act is not consummated, either because of inability on the part of the delinquent, or because of interposition of obstacles not dependent on his will, or on account of some fortuitous circumstance.



It is interesting to mention that this provision was adopted by the French Criminal Code of 1791 (through the law of Prairial 22, IV): "*toute tentative est le crime meme*," and later, by the Prussian *Strafgesetzbuch* of 1851. The French Criminal Code of 1810, which is still in force, preserved the ruling.

## II

### TREASONABLE CRIMES UNDER THE CRIMINAL CODES OF CONTINENTAL EUROPE\*

#### PRELIMINARY

The present memorandum aims to supply modern civil law materials which may be of use in interpreting the treason clause of the Constitution. This material is limited to the laws of non-fascist, non-totalitarian regimes. The treason clause of the Constitution raises three main problems:

1. Two-witness requirement.
2. The concept of an overt act.
3. Concept of aiding and comforting the enemy.

#### 1. Two-Witness Requirement

The civil law contains no such evidential requirement in connection with any crime including treason or related offenses. Towards the end of the 18th century the opinion gained a general recognition in European penal thought that no

\*Prepared by Dr. V. Gsovski, Chief, Foreign Law Section, Law Library of Congress.

rules of evidence should bind the court and that no evidential requirements should be written into the penal clauses of a statute. Therefore, no similar clauses are to be found in the penal codes of the civil law countries. The basic doctrine is that the trial judge appraises and weighs the evidence, being guided by his conscience and experience only.<sup>1</sup> Furthermore, separation of powers between the police authority and independent judiciary is relied on to provide protection of the accused against unfounded prosecution by the political authorities.<sup>2</sup> No helpful analogy or advice can therefore be drawn from civil law sources regarding the meaning or application of the two-witness requirement of the treason clause of the United States Constitution.

## 2. *The Concept of an Overt Act*

European theorists of criminal law recognize two distinct elements in an offence: the external element—human action, and the internal—the malicious frame of mind of the perpetrator, i. e., his guilt (intent or negligence). For the application of criminal law, that is, the infliction of penalty, both elements must be present in one form

<sup>1</sup> This generally accepted doctrine was expressed in some codes of criminal procedure, for instance, the German Code of Criminal Procedure:

"SEC. 261. The court shall draw the conclusions from presented evidence, following its free conviction, derived from the entire trial."

<sup>2</sup> One of the technicalities showing this principle is that the records of police investigation, as a rule, cannot be read at the trial.

or another.<sup>3</sup> It seems to be more convenient to analyse these forms for each element separately.

A. *Offence as an act.*—The principle that a man is not held criminally liable for his thoughts alone became a definitely established principle of the criminal codes of continental Europe in the 19th century. To be punished, a malicious frame of mind must be manifested in an act of commission or omission.<sup>4</sup>

However, the notion of an act as regards the crimes against the external and internal safety of the State was conceived in a manner different from that used with regard to other crimes. The generally accepted principle, *nullum crimen, nulla poenæ sine lege*, (no crime and no penalty except as established by statute) required from the penal statute a detailed specification of those acts for which a penalty may be imposed. The Judge cannot pronounce condemnation in a criminal case for an act not provided for by statute.<sup>5</sup> An act committed is not punishable unless it bears all the indicia of an offense as stated by the statute at the time when committed. Hence the broad concept of high treason, or treason (*lèse majesté*) inherited from Roman Law and used down to the

<sup>3</sup> Garraud, R., *Traité théorique et pratique du droit pénal français* . . . 3rd edition, Paris. Librairie de la Société du Recueil Sirey, 1913. Tome Premier, p. 472.

<sup>4</sup> Liszt, Franz v., *Lehrbuch des deutschen Strafrechts*, 25th ed., revised by Dr. Eberhard Schmidt. Berlin, Walter de Gruyter & Co. 1927. p. 145.

<sup>5</sup> Garraud, *op. cit.*, p. 474.

<sup>6</sup> Donnedieu de Vabres, H. F. A. *Traité élémentaire de droit criminel et de législation pénale comparée*. Paris Librairie du Recueil Sirey [1938], p. 65 et seq.

end of the 18th century was broken into a series of specific definitions of individual acts constituting each a separate crime. But all of these crimes formed two groups: one called "crimes against the external safety;" and the other, "crimes against the internal safety of the State," against the ruler and the constitution.

Thus the broad concept of treason ceased to exist and an offender had to be charged for one or another of the specific crimes into which treason was subdivided. Thereby the possibility of applying any of the definitions of external treason for the suppression of an internal political opposition was reduced to a great extent.

However, some of the crimes which replaced the *lèse majesté* continued to be treated in an exceptional manner, peculiar to the treatment of the crime of *lèse majesté*. This peculiarity may be summarized as follows:

With regard to all crimes, three main stages in the realization of a malicious frame of mind are distinguished: preparation for, attempt at, and accomplishment of a crime.

The first stage, termed "mere preparation," consists in the acquisition or the assembling of objects and means which might be used for a crime, without, however, initiating steps which would lead directly to the accomplishment of a crime. A man may buy a revolver to perpetrate a murder, or a master key to commit a larceny but may stop at that point. The general rule is that mere preparatory activities are not punishable unless they

\* Garraud, *op. cit.*, p. 475. Donnedieu de Vabres, *op. cit.* p. 137. Liszt, *op. cit.* p. 289 *et seq.*

constitute an offense in themselves, or a specific statutory clause declares them punishable. Consequently, if preparation for a given crime is not mentioned in the Criminal Code, it is not punishable.<sup>7</sup>

The second stage is the attempt, which takes place whenever a man undertakes, with the intention to commit an offense, activities immediately directed to the realization of his intent, but the designed effect does not take place. The crime fails of accomplishment either because it was prevented by some circumstance beyond the offender's control, or because the offender voluntarily ceased to act before the effect took place, or withdrew from the execution.

All the European codes are unanimous in that the attempt is subject to penalty. They differ, however, in attaching various degrees of punishment to various degrees of attempt. The Article 2 of the French Code provides that the attempt at a major crime, discontinued involuntarily, is to be treated as an accomplished crime.<sup>8</sup> The Belgian, German and some other codes punish the attempt, even involuntarily interrupted, more mildly than

<sup>7</sup>The Yugoslavian Code has the principle of impunity of preparation expressed as follows:

"Sec. 32. Paragraph 3. Preparatory activities shall not be punished except for cases expressly stated in law."

<sup>8</sup>*French Code* (as amended in 1832):

"Art. 2. Any attempt at a major crime manifested through the start of execution which was suspended or failed to achieve the effect because of circumstances independent of the will of the offender shall be considered as the crime itself."

the accomplished crime and provide for further leniency in case the attempt was discontinued voluntarily."

*Definitions of Attempt.*

*A. Belgian Code*

"SEC. 51. An attempt is punishable if the determination to commit a major or minor crime was manifested by external acts constituting a start in execution of such crime which was discontinued or failed to produce the effect because of circumstances independent of the will of the offender.

"SEC. 52. Attempt at a major crime shall be punished by a penalty immediately inferior to that established for the crime itself in accordance with Secs. 80 and 81."

*B. German Code*

"SEC. 43. Anyone who has manifested a determination to commit a major or minor crime by any act which constitutes a commencement toward execution of such crime shall be punished for the attempt, if the major or minor crime has not been completed.

"The attempt to commit a minor crime is, however, only punishable in those cases in which the law expressly provides therefor.

"SEC. 44. An attempt at a major or minor crime shall be punished more mildly than an accomplished crime.

"SEC. 46. Any attempt is not punishable if the offender:

(1) Gives up the execution of the contemplated act without having been prevented from such execution by a circumstance beyond his control; (2) Prevents by his own act the accrual of the effect constituting the criterion of a major or minor crime before his activities were discovered."

*C. Swiss Code of 1939.*

"SEC. 21. He who started the execution of a major or minor crime but did not bring his criminal activity to a consummation may be punished more mildly (Art. 65).

"If the offender withdrew from consummation of criminal activity on his own accord, the court may abstain from imposing penalty for attempt."



However, with regard to some crimes whose definitions evolved from the concept of treason, modern codes are again unanimous: An attempt is treated equally with the accomplished crime as far as the penalty is concerned. Furthermore, the mere preparation to such crimes is also punishable.

In the codes this principle was expressed by two methods: either it was definitely stated that the attempt at a certain crime is to be punished as an accomplished crime,<sup>10</sup> and the mere preparation is

*D. Polish Code of 1932.*

"ART. 23. Sec. 1. One shall be responsible for attempt who, with the intention to execute an offense undertakes activities immediately designed for realization of this intent but does not accomplish the contemplated offense.

"ART. 23. Sec. 2. An attempt is considered also where the offender does not know that the accomplishment was impossible because of lack of object suitable for the commission of the intended offense, or because of a use of such means as are unsuitable to produce the intended consequences."

*E. Yugoslavian Code of 1931.*

"SEC. 31. Whoever started the execution of an intentional offense but did not accomplish it shall be punished in case of a major crime and in case of a minor crime, only where the law prescribes so.

"SEC. 32. The offender may be punished for an attempt more mildly than for an accomplished crime."

The Yugoslavian Code authorizes the judge to abstain from the imposition of a penalty in case of an attempt with unsuitable means. (Sec. 32, para. 2, Sec. 33.)

<sup>10</sup> *Belgian Code (as amended in 1916).*

"ART. 115. The following shall be punished by death:

(3) One who facilitates the enemy of the country to enter the territory of the kingdom . . .

(4) One who seconded the progress of the enemy's armed forces on the territory of the kingdom or against Belgian land or naval forces by undermining

punishable," or the definitions of individual crimes were couched in such terms as to include activities which normally would be regarded as mere attempt or preparation. It may be stated that ordinarily the motion of an accomplished crime presupposes that a certain external effect was

the loyalty of the officers, soldiers and sailors as well as the citizens towards the King and the country.

(5) In the above-mentioned cases a *punishable attempt shall be punished equally with the crime itself.*

(6) A conspiracy for the purpose of the commission of any of the crimes specified in this article shall be punished . . .

#### *French Code*

"ART. 87. Attack [*l'attentat*], the purpose of which is to destroy or change the government . . . shall be punished . . . (This text is as amended in 1853).

"ART. 88. The execution, as well as, the attempt [*tentative*] constitutes equally an attack [*l'attentat*].

"ART. 83 (as amended in 1939). Attacks on the exterior security of the state, if committed during the time of war, shall be punished with hard labor for a period defined by the court . . . Attempt at a minor crime shall be punished as the crime itself.

#### *German Code*

"ART. 82. Any act directly tending to the carrying out of an intention shall be regarded as an undertaking by which the crime of high treason is completed.

"ART. 86. Every other act in preparation for a treasonable undertaking shall be punished with hard labor or confinement in a prison or fortress not to exceed three years.

If there are extenuating circumstances, the punishment shall be from six months to three years."

#### *Polish Code*

"ART. 96. Whoever makes preparations for the commission of offenses defined in Articles 93, 94, or 95 shall be punished by imprisonment not to exceed ten years."



caused by the act of the offender. Murder is accomplished when the death occurs, larceny when the possession of a thing is gained from another. But the definitions of many crimes belonging to the group of offenses against the external security of the country in particular do not specify any external effect as a criterion of an accomplished crime. Thus, some codes use the very word "attempt" in defining such crimes.<sup>12</sup> Others in de-

This is not the only kind of preparation which is punished under the Code. Under Art. 218, penalty of imprisonment not to exceed five years shall be applied to preparations for:

Causing danger of fire, flood, collapse of a building, of catastrophe in traffic, or land, water or air (Art. 215);

Causing a public danger to human life or health or serious damage of property by use of explosives, inflammable materials, or geysers (Art. 216);

Causing public danger to human life or health or serious damage to property:

(a) by damaging or misusing the installation of utilities such as installations supplying water, light, heat, or power, protective installations in mines and factories; or

(b) by dissemination, or by obstructing the combatting of all human, animal or vegetable contagion;

(c) by other activities under circumstances of special danger (Art. 217).

<sup>12</sup> *Polish Code*

Thus Art. 93 states:

"Sec. 1: Who attempts to deprive the Polish State of independent existence or to detach part of its territory shall be punished by imprisonment for not less than ten years, or for life, or by death."

Consequently, here the mere attempt is declared to be an accomplished crime. The attempt is defined in Art. 23 as quoted in note 9.

The Commentary to the Polish Code states precisely that

scribing the indicia of accomplished crimes use terms synonymous with attempt such as "whoever seeks," "undertakes," "endeavors."<sup>13</sup> Thus certain activities appear as offenses that did not result in any particular external effect.

Consequently, modern European penal codes require an overt act be committed if the penalty is to be imposed, but the concept of an overt act, with regard to the crimes of a treasonable nature, is stretched. This was caused, not by the desire to combat political opposition within the country but by the necessity of its protection from without. The courts being bound in criminal cases by the doctrine of *nullum crimen sine lege*, it resulted in an amendment of legislation adding more detailed statutory provisions and placing under penalty several specific activities which one may consider subsidiary to treason. Consequently to ascertain what is the equivalent of an "overt act" in European law with regard to treason, it is necessary to go over a number of sections and articles of the criminal codes describing a variety of activities which though not technically called treason, do belong nevertheless to the crimes against the external security of the State and which as a whole took the place of treason or *lèse majesté* of the olden times.

the word "attempt" is used in Art. 93 in this technical sense (Peiper, *Komentarz Do Kodeksu Karnego*, 1933, p. 293).

<sup>13</sup> The French Code, as amended in 1939, in describing various treasonable crimes uses in Art. 80, the term "d'atteinte" which is very close to "attempt" or "entrepris"—"whoever undertakes."

The Belgian Code, in Art. 101-106, uses the term "tentat" which may be translated as an attack or attempt.

The provisions concerning these specific crimes which may be called aid to treason in a broad sense establish more lenient penalties than for treason. On the other hand, they bring under such penalties activities which have a minimum result and minimum criminal intent. This raises the problem of the internal element of an offense—the intent.

*B. Offense as a manifestation of a criminal design.*—The treasonable purpose of activities continues to be a criterion of major crimes against the external security of the State.<sup>14</sup> But minor crimes of this group are so defined as to meet certain activities with penalty regardless of the purpose or motive of the perpetrator. Here the intent does not have to be directed towards a harm or prejudice to the integrity of the country or national defense. It is sufficient if it covers the very activity which is specified in the statute. They may be called formal crimes, because the mere fact of such activities is sufficient for a penalty. The intent required is restricted to this activity alone. As an example, Art. 105 of the Danish Code of 1930 or Art. 100 of the Polish Code may be used as illustrations.<sup>15</sup>

<sup>14</sup>For instance, the Belgian Code, Art. 114, penalized contact with a foreign power "for the purpose of inducing such power to undertake a war." The same terms are used in Art. 75 of the French Code as amended in 1939.

<sup>15</sup>*Danish Penal Code*

"SEC. 105. One who commits an act by virtue of which a foreign service of military intelligence is set up, or who assists directly or indirectly in its functioning on the territory of the State of Denmark, shall be punished by

Moreover some of these crimes consist in inactivity, i. e., in an act of omission. Loyalty to the country imposes the duty of its active protection. Failure to do so is a breach of duty by a citizen and results in penalty. France may be used as an interesting example of such legislation.

The French Criminal Code as originally promulgated in 1810 imposed upon every citizen the duty to report to the authorities any committed or contemplated crime against the internal or external safety of the state which came to his knowledge. Failure to comply with this duty was a crime by itself (misprision). This subject matter was dealt with in Articles 103-108 of the Penal Code. However, in 1832 these sections were repealed. But when, in 1938 and 1939, the provisions concerning espionage and treason were revised these sections were filled with a new text by the decree of July 29, 1939. This new text in parts

---

imprisonment up to two years and in cases of extenuating circumstances by detention."

#### *Polish Code*

"ART. 100. Sec. 1. Whoever in time of war acts in favor of the enemy or to the damage of the Polish armed forces or allied forces shall be punished by imprisonment not under ten years or for life.

"ART. 100. Sec. 2. If the offender unintentionally acted, he shall be punished by imprisonment not to exceed three years or by detention not to exceed three years."

The above-mentioned commentator (Peiper) comments that for application of this section "No understanding with the enemy is required and activities for his favor may take place either by joining him with arms or by diverse acts—aid in money, for instance by subscriptions to the enemy's war bonds." *Op. cit. supra*, note 23, at 310.

repeated the old provision, antecedent to 1832 and in other parts introduced new rules. The translation of both the new and the old text is appended.<sup>16</sup>

<sup>16</sup> French Code (1810, abrogated in 1832).

"ART. 103. All persons having the knowledge of conspiracies [*somplots*] formed or crimes contemplated against the internal or external safety of the State who fail to report these conspiracies or crimes and do not disclose to the Government, to the administrative authorities, or agencies charged with the investigation of crimes (*Police Judiciaire*) all circumstances which came to their knowledge, all this within 24 hours immediately following the moment when the knowledge was acquired, shall be punished, even if they are found free from any complicity, for the mere fact of non-reporting in a manner and in accordance with the distinction hereinbelow stated.

"ART. 104. If the crime of *lèse majesté* is involved everyone who in the case provided for in the preceding article failed to make the report there prescribed shall be punished by imprisonment.

"ART. 105. With regard to other crimes and conspiracies mentioned in the present chapter, every person who failed to make reports prescribed by the Art. 103 upon receipt of knowledge shall be punished by imprisonment from two to five years and fine from 500 francs to 2,000 francs.

"ART. 106. One who acquired knowledge of the above-mentioned undisclosed crimes and conspiracies cannot offer as an excuse the fact that he did not approve these or even has opposed them and tried to persuade the perpetrators not to commit them.

"ART. 107. Nevertheless, if the perpetrator of the conspiracy or crime is the husband, even divorced, ascendant or descendant, brother or sister, or a person relative by marriage in the same degree, of the person charged with misprision, the latter shall not be submitted to the penalties stated in the preceding articles. However, such person may be put by order or judgment under special surveillance of high police for a period not to exceed ten years.

This amendment seems to express the general tendency of modern democracies to protect the

"ART. 108. Penalties provided for against the perpetrators of conspiracies and other crimes against the exterior and interior safety of the State shall not be applied to those offenders who, before the execution of or attempt at the said conspiracies and crimes and before any prosecution started, have at first given to the authorities mentioned in the Art. 103 information concerning such conspiracies and crimes, their perpetrators or accomplices, or who even after the prosecution started caused the arrest of the said offenders and accomplices.

"Offenders who have reported information or have caused the arrest may be, nevertheless, condemned to remain for life or for a period of time under the surveillance of the high police."

*French Code of 1939.*

"ART. 103. Whoever, knowing about the plans of an act of treason or espionage, does not report them to the military, administrative, or judicial authorities as soon as he acquired knowledge shall be punished by penalties provided by Art. 83 for the attack on the exterior safety of the State.

"ART. 104. The same penalty shall be applied to every person who, being in a relation with a person engaged in activity prejudicial to the national defense, did not inform the authorities stated in the preceding article upon the moment when he became aware of these activities.

"ART. 105. One shall be exempt from such penalty who, before the execution of or attempt at a major or minor crime against the interior or exterior safety of the State, shall give the first information to the administrative or judicial authorities.

"ART. 106. The exemption from the penalty shall be in the discretion of the court if the denunciation is procured after the consummation of or attempt at the major or



exterior safety of the country at the expense of some liberal doctrines of the 19th century.

### 3. *Aid and Comfort*

The partnership in crime with regard to the crimes against the external safety of the State comes in many European criminal codes under special rules. European doctrine distinguished between the accomplice, that is an aid to the perpetrator of a crime, and the harboring of the criminal or objects obtained through a crime. The main difference between the two categories is that in the first instance the aid must precede the crime; in the second it is an activity aiding in the concealment of the crime committed. Consequently, for ordinary crimes no harboring of a future or intended criminal would come under any penal provision.

But many codes carry the provisions which establish a specific crime for activities which might be called mere harboring of persons who are on the way to commit a crime against the external safety of the state. *See French Code, Sec. 83, original text and Sec. 85 as amended in 1939.*

---

minor crime, but before the beginning of the prosecution.

"ART. 107. The exemption from the penalties shall be also in the discretion of the Court with regard to perpetrators who after the beginning of the prosecution cause the arrest of offenders and accomplices of the same offense or of another offense of the same nature and the same importance.

"ART. 108. Those who shall be exempt from the penalties by application of the preceding articles may be nevertheless prohibited to stay in certain places for a period of five to twenty years."



as well as the Danish, Belgium and Norwegian provisions.<sup>17</sup>

<sup>17</sup> *Harboring*

*A. French Code*

ART. 83 (prior to 1939). Whoever shall harbor or cause others to harbor spies or enemy soldiers sent for scouting, if he knew who they were, shall be punished by death."

This article was amended in 1939 and became Art. 85.

"ART. 85 (as amended on July 29, 1939). Besides persons designated in Art. 60 and 460, every Frenchman and every foreigner shall be punished as an accomplice or for harboring:

(1) Who, knowing the intentions of the perpetrators of major crimes and minor crimes against the exterior safety of the State, furnishes them subsidies, means of existence, lodging, place of asylum or meeting place.

(2) Who, knowingly carries the correspondence of the perpetrators of a major or minor crime or knowingly facilitates them in any manner whatsoever in finding, harboring, transporting, or transmitting, the objects of a major or minor crime;

(3) Who harbors knowingly the objects or instruments which served or should serve for the commission of the crime or offense or material objects or documents obtained through a crime or offense.

In a case contemplated by Section 248 the Court may free from punishment persons designated in that section who did not participate in the crime or offense in any other manner.

"ART. 61. All those who, knowing the criminal conduct of offenders engaged in brigandage, or violence against the safety of the State, public peace, persons or property, habitually furnished them with a lodging, place of asylum or a meeting place shall be punished as their accomplice.

"ART. 60. Those shall be punished as accomplices of an act qualified as major crimes, or minor crimes who incited for this act by gifts, promises, menaces, abuse of authority or power by machinations or guilty artifices, or gave the instructions for its execution;

It remains to be mentioned that under the law of most European countries, intent is defined not only

"Those who procured arms, instruments and all other means which served for the commission of the crime knowing that they were to be used;

"Those who knowingly aided or assisted the offender or the offenders in acts which they have prepared or facilitated or consummated, this all without prejudice to the punishment specially provided for by the present Code against the perpetrators of conspiracy or incitement to acts attempting at the interior or exterior security of the state in the case when the crime contemplated by the conspirators or inciters has not been committed.

"ART. 460 (as amended on May 22, 1915). One who knowingly harbors entirely or in part things carried away, embezzled, or obtained by means of a major or minor crime shall be punished by penalties stated in Art. 401.

"Fine may be increased over 500 francs up to half of the value of the object harbored.

"This all without prejudice for more severe penalties applicable in case of complicity in conformity with Art. 59, 60, and 61.

"ART. 248. One who harbors or causes another to harbor persons whom he knows have committed crimes entailing heavy penalties shall be punished by imprisonment not to exceed two years, but not less than three months.

"From these provisions shall be exempt the ascendants and descendants, husband or wife, even if divorced, brothers and sisters of the harbored criminal, or their relatives by marriage in the same degree."

B. *Danish Code* (see note 15).

C. *Belgian Code*

"ART. 120. Attempt at one of the offenses provided for in Art. 116, 119, 120 and 120<sup>a</sup> shall be considered as an accomplished offense itself.

"ART. 120<sup>a</sup> (as enacted on July 19, 1934). Without prejudice for the application of Art. 66 and 67, anyone shall be punished by imprisonment from eight days to six months and fined from 26 to 500 francs who, knowing the

as a direct will to commit a given crime (*dolus directus*) but also as an acquiescence with the

intention of authors of an offense provided for by Art. 120 and 120<sup>2</sup>; or of an attempt at one of these offenses, furnished them with lodging, place of asylum or meeting place, received or transmitted their correspondence or harbored the objects or instruments which served or should have served for the commission of the offense.

"Art. 121 (as amended in 1916). Anyone who harbors or causes others to harbor spies or enemy soldiers sent for reconnaissance, knowing who they are, shall be punished by death.

"Anyone who harbors or causes others to harbor enemy agents or soldiers in good health or wounded, or who comes to their aid in order to escape the military authorities, shall be punished by imprisonment from six months to five years and by fine from 500 francs to 5,000 francs.

#### *D. Norwegian Code*

"Art. 87. Anyone shall be punished either by detention or imprisonment up to four years who in time of war unlawfully: (1) Refuses to supply a military commander with information which the latter needs on circumstances of importance for the conduct of war, or who induces others to refuse, or (2) Harbors enemy spies, receives them or otherwise comforts them, or (3) Incites others to commit any offense punishable under the military penal law with imprisonment for a period of three years or with a heavier penalty."

#### *Accomplice*

##### *A. Belgian Code*

"Art. 67. The following shall be punished as accomplices \* \* \*

"Those who gave instruction for the commission.

"Those who procured arms, means, or instruments which were used in the major or minor crime knowing that such a use would be made of them.

"Those who, outside of the cases provided for in paragraph 3 of Art. 66, having knowingly aided or assisted the perpetrator or perpetrators of the major or minor crime

criminal effect as a possible result of the act of the offender (*dolus indirectus seu eventualis*).<sup>18</sup>

in the act which they have prepared or facilitated or which they have consummated."

*B. Swiss Code*

"ART. 25. Whoever intentionally renders assistance for a major or minor crime may be punished more mildly."

*C. Polish Code*

"ART. 27. The person is guilty of aid who gives aid by act or word in the commission of the offense."

*D. German Code*

"ART. 49. Anyone who has by word or action knowingly given assistance to an offender in the commission of a major or minor crime shall be punished as an accomplice."

*Intent*

*A. Polish Code*

"ART. 14. An intentional crime arises not only where the offender desires to commit it but also where he foresees that the criminal effect may occur, or, that his act may acquire a criminal character and nevertheless agrees with it.

*B. Yugoslavian Code*

"ART. 16. An offense is committed intentionally whenever the offender wanted its consummation or when he has foreseen the prosecuted effect which could arise from his action and agreed to its arising, regardless of whether he wanted it or not."

*C. Swiss Code (1939)*

"ART. 18. . . . a person commits a major or minor crime intentionally, if the offense is executed knowingly and wilfully.

"One commits a major or minor crime by negligence, if by culpable carelessness he acts without taking into account or without thinking of the consequences of his act. The carelessness is considered culpable where the perpetrator does not use the precautions required by the circumstances or by personal condition."

## CONCLUSION

Consequently, if a continental European lawyer is faced with the task of the prosecution of treasonable activities, he does not have to enter into the interpretation of broad concepts or broad terms such as treason, overt act, etc. The criminal codes offer a large number of specifically defined activities which come under the penal law. His task would be to select the most suitable definition available and formulate his charge accordingly.

He may also avail himself of such concepts as attempt, complicity, or indirect intent to bring within the provisions of the Statute activity auxiliary to the crime committed or contemplated.

Thus the whole system of criminal law of continental European countries presents a series of concepts which do not fit common law exactly. It is questionable as to whether the analysis of the criminal law of these countries may be helpful in the interpretation of an American Statute or Constitution except on one point. The recent amendments to criminal legislation introduced in the democracies such as France, Denmark, and Norway show an unquestionable broadening of the concept of aid to a spy. (See Articles quoted in notes 15 and 17). Thus stronger protection of the country by means of criminal law against attacks from without seems to be compatible with the protection of liberty and civil rights.

## III

## THE TWO-WITNESS REQUIREMENT IN CANON LAW\*

The present writer has been asked to investigate whether analogies from Canon law may be helpful in the construction of art. III, sec. 3 of the American Constitution. The questions briefly answered in this memorandum are: (1) Which policy led the Catholic Church to the establishment of the "two-witnesses" rule? (2) Are there any special reasons or modifications expressed for this rule in canonical trials for heresy? (3) How is the said rule construed in cases in which the testimonies of the two witnesses are overlapping with regard to the several phases of a given criminal act? (4) Do the doctrines developed by Canon law in the crime of heresy elucidate the concept of, and the manner of proof required for, an "overt act" of treason?

*Ad 1.* The "two-witnesses" rule is one of the oldest elements of canonical procedure. It has been stated repeatedly since early times by statute, judicature, and authorities as a general principle of evidence in all matters, both contentious and criminal. It is ultimately based on the scriptural text: "Take with thee one or two more so that on the word of two or three witnesses every word may be confirmed" (Mat. xviii, 16). The maxim, *unus testis nullus testis*, is considered a self-evident truth. Almost the same reasoning

---

\*Prepared by Dr. Stephan G. Kuttner, Professor of the History of Canon Law, The Catholic University of America, Honorary Consultant in Canon Law, Library of Congress.



As voiced on the occasion of framing the Constitution of the United States is frequently expressed by canonical authorities: there will rarely be two perjured witnesses in whose testimony a prudent judge would not find flaws and contradictions (the case of *Susanna*, *Dan.* xiii, is always cited as classical example), while the full convergence of the observations made by two persons has the almost irrefutable presumption of truth in its favor. Exceptions from the two-witnesses rule are admitted only in some very special cases (e. g. in certain crimes committed by a priest in the act of hearing confession) and may not be extended. Another kind of exception is prompted by the qualifications of certain types of witnesses. Thus the deposition of one public official of unquestionable standing, when he testifies on any subject of which he has information or knowledge *ex officio*, is considered sufficient evidence (*Codex iur. can.* 1781 § 1).

Ad 2. The said rule has always applied to cases of heresy—if the latter may be considered, to some extent, an ecclesiastical analogy to treason—without modification. I have not found any special reason advanced for this application, since it needs no special justification in those cases.

Ad 3. In the field of evidence, an old distinction made by Canon law is that between "full" and "half-full" evidence (*Probatio plena* and *semiplena*). The latter kind of proof is that which needs corroboration by additional, circumstantial evidence. While two fully concurring witnesses furnish full proof, certain rules have

been developed for the appreciation of so-called *testes singulares*, i. e. several witnesses whose depositions, however, do not cover the facts in question all to the same extent. Authors distinguish: (a) adversative differences, (b) cumulative differences, (c) diversificatory differences. Of these three, "adversative" differences between two or more witnesses consist of open contradictions on the same issue of fact, while "diversificatory" differences are had when one witness testifies to a different set of facts than the other, and the two sets of facts cannot by unimpeachable logical operation yield a valid conclusion (e. g. witness I testifies to having sold a distilling apparatus to the defendant, witness II to having purchased liquor from the defendant: no full proof is given that the latter has made illegal liquor).

While these two types of *testes singulares* may be disregarded for the present purpose, the remaining category is of more interest. A "cumulative" difference is had where two or more persons testify to different acts *which are coherent parts or phases of a whole*, by complementing each other or by tending towards the same end. E. g., witness I has seen the defendant loading a gun and aiming, witness II has heard the detonation of the shot: both together may sufficiently prove the act of shooting. Or witness I has seen the plaintiff plowing a field, witness II has seen him sowing some days later, witness III has seen him still later reaping the harvest: this may be sufficient evidence that the plaintiff was in bodily possession of the field. In other words, several

"singular" witnesses in the case of a merely "cumulative" difference are considered by Canon law as sufficiently complying with the two-witnesses rule, except where any factual or logical link in the chain of their observations is missing. (See Schmalzgrueber, *Jus ecclesiasticum*, book II, part III, title 21, §§ 105-6; Cardinal M. Lega, *De iudiciis ecclesiasticis*, vol. I, no. 481; but for cautious application of the doctrine in criminal cases, *id.* vol. IV, num. 222.)

*Ad 4.* The question whether, to constitute an "overt act" of treason, the treasonable intention must be manifest in the act itself, or may be inferred from actions, utterances, etc., other than the overt act but illustrating the same, can receive no elucidation from the analogous delict of heresy in Canon law. The reason is that Canon law has always followed rules different from Common law with regard to the evidence required for intention in crimes and delicts. One basic rule is that, after the external facts of a crime have been proved, there exists a presumption for the presence of malicious intention (*dolus*) with the defendant (cf. *Codex iur. can.* 2200 § 2). The burden of proof for the absence of intention therefore rests with the latter. On the other hand, the proof of subjective innocence (absence of full intention) is often made very easy to the defendant (cf. *Codex iur. can.* 2229 § 2), in order to counterbalance the jeopardy entailed by the previous rule. Such fundamental differences make that the construction of treason in American law can, in the opinion of this writer, derive no support from anything analogous in Canon law. This

also holds true for any comparison between "giving aid and comfort to enemies" (Constit. art. cit.) and the crime of knowingly and willingly giving aid to an heretic (*Codex jur. can.* 2316). Here too, the rules of evidence differ because of the *praesumptio doli* once it is established that the supporter has given the aid.

## APPENDIX B\*

### ANGLO-AMERICAN MATERIALS

#### INTRODUCTION AND BIBLIOGRAPHICAL NOTE

##### (a) OVERT ACT AND INTENTION IN TREASON

Etymologically, "treason" has always meant a breach of faith or loyalty. In Anglo-American law, it has meant, in general, the betrayal of allegiance owed a political sovereign. Allegiance in this sense may be based either on citizenship, or, ("local allegiance"), on presence in the sovereign's territory, accepting the benefit of the sovereign's protection. The precise definition of the allegiance, the breach of which constitutes treason, has been the subject of much ancient learning. The present inquiry, however, has focussed on two matters which have received less careful analysis: the definition of the intent and act elements in the crime of treason and a consideration of their mutual relationship.)

The allocation of emphasis in the following essays has been determined by the relative, practical value of the historical sources rather than by

\*Appendix B, with the exception of the section on English case law prior to 1790, was prepared by Willard Hurst, on leave as Associate Professor of Law, University of Wisconsin. The materials under the heading of English case law prior to 1790 were collected and prepared in the first instance by attorneys on the staff of the Department of Justice, and revised and edited by Mr. Hurst.

adherence to logical symmetry. There is historic logic in beginning with the English materials, because American policy was derived from American ideas concerning the meaning of English experience as well as American professional familiarity with English statutes, and treatises. On the other hand, no effort is made to relate all the ramifications of the English law; instead, attention is put on those aspects of the English material which evidence indicates were most significant to Americans, or which best illuminate the development of the branches of treason which concerned American law. Thus, there is placed first an analysis of the accounts of "treason" given in the great English law treatises prior to the adoption of the United States Constitution. This is both because only in the treatises do we find any careful effort to analyze the policy and the elements of the crime, and because the Americans obtained their knowledge of the English law and experience primarily from the treatises. English policy attitudes towards the major branches of treason are brought up to date in a brief summary of 19th and 20th century writings. Granting always the fundamental importance of the Statute of 25 Edward III to all sources on the law of treason, a discussion of the English statutory material may properly follow that regarding the treatises, since the statutory evolution contributes little to explicit analysis of the crime, but is of significance for the somewhat ambiguous threads of policy appearing in it. Somewhat surprisingly, the case materials deserve only third rank in value; the impressive volumes of the State Trials contain a maximum of pleadings, tedious



testimony and records of executions, and a minimum of helpful analysis of the policy and elements of the crime. Moreover, one famous case after another proves, on careful examination, to be so interwoven with the peculiar politico-religious motives and pressures of its time as to be of little value beyond furnishing cumulative evidence that careful and realistic definition of the crime is necessary if it is not to be readily abused as an instrument of faction. Finally, there is little satisfactory evidence that Americans had access to, or extensive knowledge of the records of the English trials, as distinguished from their familiarity with the basic English statutes and treatises.

Prior to the framing of the Constitution, the principal development of the law of treason in this country was through legislation, and analysis of the colonial and state statutes before 1787 thus forms the bulk of the first essay on American materials. There follows an examination of such discussions of the treason clause as occurred in connection with the framing and ratification of the Constitution. Subsequent developments in state constitutions and in Federal and state legislation follow the model of the Philadelphia Convention so closely that no separate discussion of these sources has seemed profitable. Analysis of American materials is, therefore, concluded with detailed examination of Federal and state court decisions after 1790. Though few in number, and limited in the range of their exploration of issues, the American cases contain suggestive implications regarding the scope of "treason",

and they take on further interest because an unusually high proportion of the opinions involved were rendered by members of the Supreme Court of the United States presiding as Circuit Justices.

(b) BIBLIOGRAPHICAL NOTE

(1) *English Material*

Selection of treatises for emphasis was determined primarily by the evidence of those most cited in English cases and in American constitutional and case material. Search was made of subsidiary English treatise material available in the Library of Congress, sufficient to assure that the basic books were properly relied on as giving the important outlines of English legal analysis of the crime. Guidance was had from Winfield, *The Chief Sources of English Legal History* (Cambridge, Mass. 1925) and Jelf, *Where To Find Your Law* (3d ed. London, 1907.) Statutory development was checked through Halsbury's *Laws of England* and Holdsworth. As the basis for study of English decisions, Howell's *State Trials* were paged, volume by volume; and this search was supplemented by examination of the *Law Reports*.

(2) *American Colonial and State Material*

Colonial charters, proprietary grants; and colonial and state "Fundamental Articles" and constitutions for each of the original 13 states were examined in Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* (7 vol. Government Printing Office: Wash-

ington, 1909). Instructions to royal governors were checked by means of Labaree's collection (Labaree, *Royal Instructions to British Colonial Governors, 1670-1776*. (2 vol. N. Y. 1935). Royal surveillance of the action of colonial legislatures and executive and judicial agencies under these fundamental legal documents was observed through published records of the Board of Trade and the Privy Council, in the light of the commentaries by Hazeltine, Russell, Schlesinger, and Washburne, cited in the footnotes.

Search was made for all legislation relevant to the offense of treason and related crimes, passed in each of the 13 original states from the earliest records available through 1790, and in Vermont from its separation from New York, in 1776 through 1790. For this purpose, each collection, compilation and revision of the statutes of each colony and state published in the indicated period was examined. Full coverage was assured by checking the search against the Babbitt bibliography of American legislative materials, [Babbitt, *Hand-List of Legislative Sessions and Session Laws, Statutory Revisions, Compilations, Codes, etc., and Constitutional Conventions of the United States and Its Possessions and of the Several States to May, 1912*. (State Library of Massachusetts. Boston, 1912)], and wherever gaps appeared, or wherever the compilations indicated the omission of possibly relevant, repealed, expired or obsolete statutes, resort was had to the volumes of session laws. Because of the variations and unreliability characteristic of statutory indexing, the index to each volume was checked item by item, and in numerous cases where the

indexing was more than usually poor, the volumes were paged. The state of the materials and the available tools for their use is such that some pertinent materials have undoubtedly been missed, but it is believed that the search has been close enough to reveal any material of major consequence.

The Century Digest indicates no recorded decisions in treason cases prior to 1790, except the handful of Pennsylvania cases in the volumes of Dallas. As a cross-check, however, all volumes of American decisions for this period, as listed in Hicks, *Legal Research* (Rochester, 1942) were examined. There were scattering prosecutions for treason in the various colonies and states which were not recorded in the law reports. In addition to Wharton's *State Trials of the United States* (Philadelphia, 1849), and Lawson's *American State Trials* (17 vol. St. Louis, 1916-1926), the local history collections in the Library of Congress were checked for such evidence as could be found of the character of these trials.

The literature of early colonial and state legal history has been examined. Particular attention was given to discussions of problems involved in the reception of the common law in the United States, and to the question of the extent to which English statutes, decisions and treatises were available to American lawyers and statesmen. To the extent that time allowed, the legal materials were placed in a broader frame of reference by resort to standard histories, especially Channing, *History of the United States*, Andrews, *The Colonial Period of American History*, Osgood, *The*

*American Colonies in the Seventeenth Century*, Beard, *The Rise of American Civilization*, and Morrison and Commager, *The Growth of the American Republic*.

### (3) *The Confederation*

Check was made of the Declaration of Independence, the Articles of Confederation and the "Ordinance of 1787 for the government of the territory of the United States northwest of the river Ohio". *The Journals of the Continental Congress* (Government Printing Office: Washington, 1930) were examined, volume by volume, as well as Burnett's *Letters of Members of the Continental Congress* (Washington, 1921), and his history, *The Continental Congress* (N. Y. 1941): Legislation of the Northwest Territory, as published by the Illinois State Historical Library, was also checked. Standard works already noted in the search of colonial and state material were of course pertinent.

### (4) *The Constitution*

For the Philadelphia Convention, and its sequel, the basic sources are, of course, Farrand, *The Records of the Federal Convention of 1787* (New Haven, 1937), *The Federalist* (Lodge ed., N. Y. 1902), and Elliott, *Debates in the Several State Conventions on the Adoption of the Federal Constitution* (2d ed. Washington, 1854). Farrand brings the material on the Federal Convention satisfactorily up to date. Elliott was supplemented by the monograph material on the various state conventions, the most important of which is

McMaster and Stone, *Pennsylvania and the Federal Constitution* (Philadelphia, 1888). The *Federalist* was complemented by the two collections of polemical pamphlets on the ratification of the Constitution, edited by Paul Leicester Ford. The history of the first treason act (Act of April 30, 1790, Ch. IX, 1 Stat. 112) was checked in the *Annals of Congress* and in the *Journal of Senator Maclay* (Harris ed. Harrisburg, 1880).

In search of material which might cast light on the views of policy held by leading figures of the Constitutional period, an examination was made of the published papers and all standard biographical material in the Library of Congress of John Dickinson (Pennsylvania), Oliver Ellsworth (Connecticut), Benjamin Franklin (Pennsylvania), Alexander Hamilton (New York), James Iredell (North Carolina), Thomas Jefferson (Virginia), William Johnson (Connecticut), Rufus King (Massachusetts), James Madison (Virginia), George Mason (Virginia), Gouverneur Morris (Pennsylvania), James Paterson (New Jersey), Charles Pinckney (South Carolina), Edmund Randolph (Virginia), John Rutledge (South Carolina), Roger Sherman (Connecticut), Richard Dobbs Spaight (North Carolina), George Washington (Virginia), James Wilson (Pennsylvania) and George Wythe (Virginia). Because internal evidence suggested that these men had particular interest in the drafting of what became the standard American definition



of "treason", especially detailed search was made of the papers of Thomas Jefferson and James Wilson. The cooperation of the State Library, Richmond, was enlisted regarding the first, and the Wilson papers in the Pennsylvania Historical Society were examined in connection with the second. Force's *American Archives* were used as a general cross check in this field of inquiry. Certain leading American legal works in the first generation of the Constitution or of the immediately preceding period were referred to for further evidence of the climate of opinion, notably Kent's *Commentaries*, ~~Tuckers~~ *Blackstone*, and the constitutional treatises of Rawle, Sergeant and Story.

(5) *American Material After 1790*

Convenient, recent lists of state constitutional and statutory provisions on treason will be found in Sen. Doc. No. 173, 57th Cong., 1st Sess. (1902), 7 Wigmore on *Evidence* (3d ed. Boston, 1940) sec. 2039, p. 272, n. 2, and in *Constitutions of the States and United States* (New York State Constitutional Convention Committee, Albany, 1938) (index heading, "Treason"). Search for cases was made through all regular channels, supplemented by the Wharton and Lawson *State Trials* collections, as well as by standard works on American history, already referred to, and by a search of the bibliographies of United States government documents. Biographical material dealing with central figures in notable trials was examined so far as available.

## I

## TREASON IN ENGLAND

## 1. TREATISES

(a) *Early English Treatises*<sup>1</sup>

Significantly, there is no word of any policy restrictive of the scope of "treason" in the brief definitions and discussions of the early books (Glanvill, Bracton, Britton, Staundford). The

<sup>1</sup>The following are the treatises referred to herein (in chronological order):

Glanvill, *De Legibus et Consuetudinibus Regni Angliae* (c. 1187-1189) (1) edited by George E. Woodbine (New Haven, 1932); (2) translation by John Beames (Washington, 1900).

Bracton, *De Legibus et Consuetudinibus Angliae* (c. 1250-1258): (1) edited by George E. Woodbine (4 vol. New Haven, 1932 ff.); (2) translation by Sir Travers Twiss (6 vol. London, 1879).

Fleta (c. 1290) (London, 1647).

Britton (c. 1290). (Nichols, ed. 2 vol. Oxford, 1865).

Fortescue, *De Laudibus Legum Angliae* (c. 1470) (Chrimes, ed. Cambridge 1942).

Staundford, *Les Pleees del Corone* (1569). (London, 1607).

Coke, *Institutes of the Laws of England: Third Part* (5th ed. London, 1671).

Hale, *History of the Pleas of the Crown* (2 vol. Emlyn, ed. London, 1736-1739). (All citations herein are to vol. 1.)

Kelyng: *A Report of Divers Cases in Pleas of the Crown, Adjudged and Determined in the Reign of the late King Charles II, etc.* Collected by Sir John Kelyng, Knt. (London, 1708) (3d ed., London, 1873).

Hawkins, *A Treatise of the Pleas of the Crown or A System of the Principal Matters relating to that subject,*

crime is simply set forth in positive terms, looking to the interest in the security of the king and his authority. Staundford notes that the Statute of Edward III asserted the need for resolving the uncertainties of the common law regarding the extent of the offense, but he does not feel impelled to add any special words of praise for the endeavor.<sup>2</sup> Appropriately, the new emphasis on safeguarding the liberty of the subject first appears in Coke. His discussion is not wholly consistent in this respect,<sup>3</sup> and in one instance especially, he avows a principle of liberal construction in favor of the king:

This compassing, intent, or imagination, though secret, is to be tryed by the peers, and to be discovered by circumstances precedent, concomitant, and subsequent, with all endeavour everimore for the safety of the King.<sup>4</sup>

This is said, however, with reference to the most vague and precautionary head of the Statute, which is pointedly omitted in the restrictive terms

---

digested under proper heads (1716) (7th ed. 4 vol. London, 1795).

Foster, A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746 in the County of Surry; and of other Crown Cases (1762) (3d ed. London, 1792).

Blackstone, Commentaries on the Laws of England (4 vol. Oxford, 1769). (All citations herein are to volume 4).

<sup>2</sup> Staundford, Lib. 1, Cap. 2, 1-0.

<sup>3</sup> Note his emphasis on the declaratory aspect of the Statute, and his unquestioning acceptance of the doctrine that in treason all are principals. Coke, 1 (n), 9, 16, 138.

<sup>4</sup> *Id.*, 6. This comment is the more striking, because it is made after Coke had emphasized the provision retaining in Parliament the authority to declare new treasons.

of the Constitution of the United States. Apart from this, the general terms of Coke's analysis are all such as to stress that the distinguishing mark of the Statute of Edward III is its limitation of the scope of the crime.

And albeit nothing can concern the King, his Crown and Dignity, more, then *Crimen laesae Majestatis*, High Treason: Yet at the request of his Lords and Commons, the blessed King by authority of Parliament made the Declaration, as is abovesaid: and therefore, and for other excellent laws made at this Parliament, this was called *Benedictum Parliamentum*, as it well deserved. For except it be *Magna Charta*, no other Act of Parliament hath had more honour given unto it by the King, Lords spirituall and temporall and the Commons of the Realm for the time being in full Parliament, then this Act concerning Treason hath had, For by the Statute of 1 H. 4. cap. 10. reciting that where at a Parliament holden 21 R. 2 divers pains of treason were ordained by Statute, in as much as there was no man did know how to behave himself to doe, speak, or say, for doubt of such pains: It is enacted by the King, the Lords and Commons, that in no time to come any treason be judged otherwise, then it was ordained by this Statute of 25 E. 3 \* \* \* [After reciting other acts to the same effect:] And all this was done in severall ages, that the faire Lillies and Roses of the Crown might flourish, and not be stained by severe and sanguinary Statutes \* \* \*

<sup>5</sup> *Id.*, 2-3. Note that James Wilson, as defense counsel in the Pennsylvania treason trials of 1778, referred to this designation of the "benedictum Parliamentum." 7 Penn-

At the outset of his disussion, he emphasizes the importance of the clause referring the declaration of new treasons to Parliament, and subsequently he points out that this means, broadly, that the judges "shall not judge *à simili*, or by equity, argument, or inference of any treason," and that the statutory injunction that nothing be taken to be treason thereunder which is not "specifically" so declared, is

A happy sanctuary or place of refuge for Judges to flye unto, that no mans blood and ruine of his family do lie upon their consciences against law. And if that the construction by arguments *à simili* or *à minori ad majus* had been left to Judges, the mischiefe before this statute would have remained, viz. diversity of opinions, what ought to be adjudged treason, which this statute hath taken away by expresse words. \* \* \*

He cautions, though, that

\* \* \* the clause \* \* \* of restraint of like cases, &c. extends onely to offences, and not to tryals, judgements, or executions.

But this seems to refer to matters of procedure and sentence, and, in view of the general emphasis of the treatise, does not mean that the scope of the offense might in effect be extended by new defi-

---

sylvania Archives (Hazard, ed. Philadelphia, 1853) 51. Compare Coke's praise and emphasis on the restrictive character of the Statute of 1 Mar., *id.*, 23.

\* *Id.*, 21, 22.

\* *Id.*, 15. Compare 21: "And note this branch extendeth (as hath been said) to the offence, viz. treason, and not to tryall, judgement, or execution."

nitions of the evidence which would suffice to make out a charge under one of the classic headings.<sup>9</sup> Coke applies the doctrine of strict construction to limit the offense of adherence to enemies:

A. is out of the Realm at the time of a Rebellion within England, and one of the Rebels flees out of the Realm, whom A. knowing his treason doth aide or succour, this is no treason in A. by this branch of 25 E. 3. because the traytor is no enemy, as hereafter shall be said; and this statute is taken strictly.<sup>9</sup>

Again, since the words of the statute punished him who should bring counterfeit money "en cest roialme", it was not an offense within this clause if the counterfeit was brought from Ireland, which for some purposes is a part of the realm,—

\* \* \* so wary are Judges to expound this statute concerning Treason, and that in most benigne sense. \* \* \*<sup>10</sup>

There is nothing in Coke's discussion more explicit than the passages quoted above, to indicate that his praise of the restrictive policy evidenced by the Statute of Edward III was given with particular thought to prevention of oppressive resort to "treason" prosecutions in domestic political con-

<sup>9</sup> Thus the remark quoted in the text is made in connection with his pointing out that standing mute or giving a confession may yet be a basis for conviction under the Statute. And compare his emphasis that conviction must be "upon direct and manifest proof; not upon conjecturall presumptions, or inferences, or straines of wit" in view of the Statute's requirement that defendant be "provablement" attained. *Id.* 12, 21.

<sup>9</sup> *Id.* 11.

<sup>10</sup> *Id.*, 18; cf. 4.



troversy, as distinguished from charges of dealing with external enemies. But, it will be noted that his reference to strict construction in the case of the crime of adhering to enemies points towards keeping that clause of the Act out of the sphere of home politics. And the fact is, that the "divers pains of treason \* \* \* ordained by Statute", which are cited as oppressive and threatening in their vague scope, all focussed on the struggle for power immediately between essentially English factions. This seems true even of legislation directed against the assertion of papal power. This matter is more explicitly treated in Hale, and will be noted further at that point.

The earliest books are thoroughly ambiguous as to the kind of overt act, if any, required to make out a case under the various headings of "treason". Glanvill recognizes the existence of the

*Crimen quod in legibus dicitur crimen laesae maiestatis, ut de nece vel seditione personae domini regis vel regni vel exercitus*

and this he later described as existing.

*Cum quis itaque de morte regis vel de seditione regni vel exercitus infamatur*<sup>11</sup>

but these definitions—though interesting for the hint of Roman influence ("laesae maiestatis")—shed no light on the types of conduct which would fit these general descriptions. At only one point, in describing the steps in procedure, does he approach specifications:

<sup>11</sup> Lib. 1, cap. 2 (Woodbine, 42; Beames, 2); Lib. 14, cap. 1 (Woodbine, 174; Beames, 278).

Ad ultimum autem accusatore proponente se vidisse vel alio modo in curia probato certissime se scivisse, ipsum accusatum machinatum fuisse vel aliquid fecisse in mortem regis vel seditionem regni vel exercitus, vel consensisse vel consilium dedisse vel auctoritatem praestitisse \* \* \*

At length, however, when the accuser has charged that he saw, or that, by another way proved in court, he knew for a certainty that the accused had plotted or had done something towards the death of the king [against the life of the king] or insurrection in the kingdom or in the army or had consented or given counsel or conferred authority therefor \* \* \*<sup>12</sup>

This seems to put simple conspiracy or plotting of the named ends on a par with their execution, so far as the offense goes. If conspiracy is put aside, however, Glanvill seems to refer to overt acts ("vel aliquid fecisse") not as inherently reflecting evil intent, but simply as an independent element of the crime; and this seems reinforced by the fact that, as he puts it, the relevance of the "something" which was done was that it put a train of events in motion, looking towards one of the specified purposes or results ("in mortem regis vel seditionem regnie vel exercitus": the use of the accusative with "in"). Thus when action is referred to as an element in the completed offense,—whatever the significance of the act in a charge of conspiracy to commit the offense,—Glanvill does not indicate that the action is significant as evidence of intent but as evidence of the fact of

<sup>12</sup> *Ibid.* (Woodbine, 174-175/Beames, 281). (Present author's translation.)

beginning execution of the intent. It is also interesting to note that at this early reference, there is the idea that contact or conference with dangerous persons presents *per se* a social danger.

These implications—including the suggestion of Roman ideas of the basic policy of protecting the head of the state—are reinforced in the terse definition of Bracton:

Habet enim crimen laesae maiestatis sub se multas species, quarum una est ut si quis ausu temerario machinatus sit in mortem regis, vel aliquid egerit vel agi procuraverit ad seditionem domini regis vel exercitus sui, vel procurantibus auxilium et consilium praeberit vel consensum, licet id quod in voluntate habuerit non perduxerit ad effectum.

For the crime of lèse majesté includes many types, one of which is, if anyone out of rash daring [by a deed of rash daring?] should plot the death of the king, or do something or cause something to be done towards the betrayal of our lord the king or his army or gives aid and counsel to those procuring these things; or gives consent thereto, though he does not carry through to accomplishment what he had in intention.<sup>13</sup>

<sup>13</sup> F. 118b (2 Woodbine 334; 2 Twiss 259). "Seditio" is often used in this period interchangeably with "seductio". Though, in its context, the word may be more ambiguous in Glanvill, in Bracton it seems a fair inference that it does not mean "sedition" in the phrase "seditionem domini regis", and that hence it does not mean this regarding the army. Compare 2 Pollock and Maitland, *History of English Law* (2d ed. Cambridge, 1923) 503, n. 2: "We believe that in these passages [Glanvill and Bracton] the best rendering for *seditio* is, not *sedition*, but *betrayal*." Translation in text is by the present author.

Whether or not "ausu temerario" means that an overt act was necessary in Bracton's view for the offense of compassing the king's death—Coke thought not"—Bracton seems clearly to require overt acts for the offense denominated "seditionem domini regis vel exercitus sui", and the something which must be shown to have been done ("aliquid egerit vel agi procuraverit") is treated as important not as evidence of intent, but because it puts in train a course of action leading to the forbidden result (the use of "ago" with "ad \* \* \*" seems significant, i. e.). The importance of the fact of action taken towards the prohibited purpose seems implied in the contrast of "machinatus si in mortem regis" and "aliquid egerit \* \* \* ad seditionem \* \* \*"; and

Professor George E. Woodbine has given his opinion regarding Bracton's use of "consilium" in this passage in a letter of August 20, 1944, as follows:

In the passage from Bracton (f. 118b) \* \* \* I would not regard "comfort" an adequate translation of *consilium*. "Counsel", in its usual sense, is apparently what Bracton had in mind. To Bracton *auxilium et consilium* would be a matter of fact and (unlike our technical "aid and comfort") non-technical expression. He clearly had in mind the case of the man who stays in the background and gives advice to the one actively engaged in the plotting. I take it that the giving of this advice is with obvious treacherous intent. If the plotter to whom the advice is given is regarded as the "enemy", *consilium* should certainly be construed to cover the fact of contact with the enemy.

<sup>14</sup> Coke, 6. Foster, 205, would take it not adverbially regarding the quality of the intent, but as referring to an overt act.

by the final contrast of the intention and the incomplete course of action.

Britton and Fleta are of no assistance in defining the scope of the offense, though the former's definition is interesting for the sweeping principle of punishing "betrayal" which he announces and for his concentration on plotting the king's death.<sup>15</sup> Staundford notes that at common law "*cestuy qui succorda as enemyes le roy*" was guilty of treason; this is probably the offense of adherence ("*succurro*"?) and implies an overt act as an independent element of the crime.<sup>16</sup> His most interesting discussion concerns the offense

See Britton, Liv. 1, Chapitre IX (1 Nichols, 40): "*Tresun est en chescun damage que hom fet a escient ou procure de fere a cely a qui hom se fet ami \* \* \** Grant tresoun est a compasser nostre mort, ou de nous desheriter de noster reume, ou de fauser noster seal, ou de contrefere nostre moene ou de retoindre \* \* \*" *Id.* Liv. 1, Chapitre XXIII (1 Nichols, 99): "*Et cum il vendrunt en jugement, si face le encusour son apel par nous en ceste forme par acun serjaunt. Johan, qi ei est, apole Peres, qi ilocques est, de ceo qe, com il fa en certeyn leu a tel certeyn jour a tel an, la oy mesmes cestui Johan purparler tele mort, ou tiel treysoun par entre cestui Peres et un autre, tel par noun, et par tieles aliaunces, \* \* \**" Nichols translates this as, "And when they appear for trial, let the accuser make his appeal for us by some serjeant in this manner. John who is here appeals Peter who is there of this, that being in such a place on such a day and year, the same John there heard such a death or such a treason contrived between the same Peter and another, such an one by name, and by such confederacies," and that John is now ready to prove by his body in any manner the Court shall award that this is the truth. See Fleta, Lib. 1, Cap. 21. *Id.* The Mirror of Justices (Robinson, ed., Washington, 1903) 39, 91; see 2 Pollock and Maitland, *op. cit. supra*, note 13, p. 478, n. 1.

<sup>15</sup>Staundford, Lib. 1, Cap. 2, 1 S.

of compassing the king's death, as set out in the Statute of Edward III, of which he comments,

Cest compassement, ou imagination, sauns reducer ceo al effect, est grand treason, come apiert. M. 19. H. 6. f. 47. & P. 13. H. 8. fo. 13. Mes intant que compassement & imagination sont secrete, & ne poient estre conus sinon per un overt fait, est requisit daver ascun chose fait, a signifier le dit compassement ou imagination. Per que ie query, si le dit compassement ou imagination uttere per parolx soit sufficient signification de ceo ou nemye \* \* \* Bracton. Semble que cy \* \* \* Britton in semblable maner \* \* \*

He notes that the Statute of Edward III adopts the same terms used by the early treatises regarding the offense of compassing the king's death, and so indicates his belief that the statute is to be interpreted according to the scope of the previous authorities. Coke disagreed, emphasizing the over-all and explicit requirement of an overt act under that statute, though he felt that a writing might be an overt act.<sup>17</sup> Staunford does not mention the overt act requirement of the Statute of Edward III, and in view of his broad language it is questionable whether he did not overlook it in connection with his analysis of the offense of compassing the king's death. In any event, he introduces us to an ambiguous terminology which bedevils discussion henceforth. When he says that an "overt fait" is necessary, because compassing is secret and cannot be known

<sup>17</sup> *Id.*, 2-H. Fortescue has no discussion of the definition of the crime.

<sup>18</sup> Coke, 14.



without such, he seems to regard the act as relevant simply as evidence of the treasonable intent; but he sums up by saying that "ascun chose fait" is necessary "a signifier" ("declare" or "show") the compassing. The overt act might "declare" the compassing, however, either in the sense of evidencing a treasonable intent, or of translating the intent into the world of action by some thing done towards its execution. There seems to be no further help in Staundford to resolve this difficulty, and his discussion is of limited usefulness in any case, because it deals only with the crime of imagining the death of the king.

Coke uses this ambiguous wording, in repeated statements that the offenses of compassing the king's death and adhering to his enemies include the element of "declaring the same by some overt deed". There are important passages in which he seems to regard the overt act as relevant, because and insofar as it helps prove treasonable intent. Thus, speaking of the Statute of Edward III, he states,

The composition and connexion of the words are to be observed, *viz.* [thereof be attained by overt deed]. This relateth to the severall and distinct treasons before expressed, (and specially to the compassing and imagination of the death of the King, &c. for that it is secret in the heart) and therefore one of them cannot be an overt act for another. As for example: a conspiracy is had to levie warre, this (as hath been said, and so resolved) is no treason by this Act untill it be levied, therefore it

<sup>2</sup>*Id.*, 3, 4, 6, 8.

is no overt act or manifest prooffe of the compassing of the death of the King within this Act; for the words be (*de eeo &c.*) that is, of the compassing of the death. For this were to confound the severall Clauses \* \* \* <sup>20</sup>

Thus he puts special emphasis on the overt act requirement as applied to that one of the offenses embraced by the statute the gist of which most clearly is the intent. Previously, in constructing an analytical table of the crimes defined by the act, he included in the offenses of compassing the king's death and adhering to his enemies the element of "declaring the same by some overt deed" as has been noted; but he omits this reference regarding the levying of war.<sup>21</sup> Clearly he views an overt act as an element of the last named crime, but it would seem that he felt that the conduct which would amount to levying war so plainly, of its intrinsic character, "declared" the treasonable intent, that no special emphasis was called for in his analysis. Note also, in the passage quoted above, that if a conspiracy to levy war were treated as a sufficient overt act to establish the offense of compassing the king's death, in Coke's view its relevance would be as an "overt act or manifest prooffe of the compassing \* \* \*"

Further, he explains his view that words will not generally make an overt act, in terms which might seem to indicate that the relevance of the overt act is to prove clearly the existence of treasonable intent:

<sup>20</sup> *Id.*, 14.

<sup>21</sup> *Id.*, 3.

\* \* \* the wisdom of the makers of this law would not make words only to be Treason, seeing such variety amongst the witnesses are about the same, as few of them agree together. But if the same be set downe in writing by the Delinquent himselfe, this is a sufficient overt act within this statute. \* \* \*

In the Preamble of the statute of 1. Mar. concerning the repeale of certaine Treasons, &c. It is agreed by the whole Parliament, that lawes justly made for the preservation of the Common-wealth without extreame punishment, are more often obeyed and kept, then lawes and statutes made with great and extreame punishments; and in speciall, such lawes and statutes so made: whereby not only the ignorant and rude unlearned people, but also learned and expert people minding honesty, are oftentimes trapped and snared, yea, many times for words only, without other fact or deed done or perpetrated: therefore this Act of 25 E. 3. doth provide, that there must be an overt deed. But words without an overt deed are to be punished in another degree, as an high misprision.<sup>22</sup>

However, a close examination of these famous passages suggests that, in the first, Coke is merely saying that—regardless whether offered to prove intent or overt act—mere spoken words are inherently too unreliable in witnesses' memories to be a just basis for establishing so high a crime. And in the approving recital of the Statute of 1 Mary, it is important to note that the objection

<sup>22</sup> *Id.*, 14.

is particularly to a case where the spoken words are the *sole* evidence, to prove all elements of the crime. Rather than reading this to mean that the overt act must always be such as itself evidences treasonable intent, it would seem more natural to construe the criticism as being simply that in many cases the spoken words, being offered as sole proof of the intent, were not adequate for that purpose, quite apart from their adequacy as an overt act. If spoken words are not generally a sufficient overt act, it will then be, as Coke later suggests was the general common law doctrine, simply because they generally do not represent a sufficient advance beyond the stage of thought into that of execution.<sup>22</sup> Though the interpretation of Coke's words here set out seems a reasonable one, his marginal note to the quotation from the preamble of the Statute of 1 Mary throws the matter back into doubt, for there he warns,

*Nota, this Act of 25. E. 3 saith, per overt fait, per apertum factum, and not per apertum dictum, by word or confession.*

Coke here created an ambiguity which continues to fog analyses of the law of treason, as may be seen, for example, in Hale.

<sup>22</sup> Coke, 5. The marginal note on the same page comments, "Sed haec voluntas non intellecta fuit de voluntate nudis verbis, aut scriptis propalata, sed mundo manifestata fuit per apertum factum. Id est, cum quis dederat operam quantum in ipso fuit, ad occidenda, & sic de similibus." This seems to involve the ambiguity already noted in the use of the word "declare".

Throughout his discussion, Coke gives examples of overt acts which, without exception, seem acts which themselves are some evidence of treasonable intent. It is not clear whether he would hold that a meeting of conspirators to plot the king's death was a sufficient overt act for that broadest of offenses.<sup>24</sup>

On the other hand, there is evidence that Coke thought of the overt act as a separate element of the offense, whose function was not to furnish more objective evidence of the treasonable intent, but to establish that the business had moved from the realm of thought into the realm of action. He does not clearly link this with a general policy of the criminal law, that men are not prosecuted for wicked thoughts alone; but the belief that, after the Statute of Edward III at least, treason was in this respect no different from other crimes seems implicit in his treatment. Thus he begins by contrasting the common law crime of compassing the king's death with the general common law offense of compassing the death of an ordinary

<sup>24</sup> Coke does not indicate that of his own knowledge he knew of Arden's case (1583-4), referred to by Hale (vol. 1, p. 119); the case was apparently first reported after his death, in 1. Anderson 104 (1664). See note 39, *infra*. In the passages cited in notes 25, 26 and 27, *infra*, it will be noted that his references to persons "conspiring" all include mention of some further overt act. But his assertion that a conspiracy to levy war could not be an overt act of compassing the king's death (note 20, *supra*) seems to rest on a mechanical view of the separateness of the statutory definitions, and not on the view that the "conspiring" was not otherwise a sufficient overt act. Quære, whether the sending of letters (referred to in the passage quoted at note 25, *infra*), might not involve ambiguous conduct.

subject. He cites (Coke, 5) the maxim "*Voluntas reputabatur pro facto*", endorsed by Bracton, but points out that even under this principle, to be guilty, the defendant "must declare the same [i. e. his "*voluntas*"] by some open deed tending to the execution of his intent, or which might be cause of death" and that the crime was made out.

So as it was not a bare compassing or plotting of the death of a man, either by word, or writing, but such an overt deed as is aforesaid, to manifest the same. So as if a man had compassed the death of another, and had uttered the same by words or writing, yet he should not have died for it, for there wanted an overt deed tending to the execution of his compassing."

The examples he gives are of aggravated attempts failing short of success, but his emphasis is not that the deeds evidence the intent, but—a more objective stress—that they "tend to the execution of his intent". He then points out that the requirement of an overt act, under the Statute of Edward III, applies to all of the offenses defined therein, including compassing the king's death; and, as he has asserted that the Statute "is for the most part Declaratory of the ancient Law", it is a fair inference that he would interpret the overt act requirement now inserted in the offense of compassing the king's death in the same manner which he had interpreted that element in the general common law offense of plotting the death of a subject. The objective tendency of the act to forward a course of conduct seems the aspect which is stressed when he explains that the words "*Per overt fait*"

<sup>20</sup> Coke, 5.



doth also strengthen the former exposition of the word [provablement] that it must be probably, by an open act, which must be manifestly proved. As if divers do conspire the death of the King, and the manner how, and thereupon provide weapons, powder, poison, assay harnesses, send letters, &c. or the like, for execution of the conspiracy. Also preparation by some overt act, to depose the King, or take the King by force, and strong hand, and to imprison him, until he hath yielded to certain demands, this is a sufficient overt act to prove the compassing, and imagination of the death of the King: for this upon the matter is to make the King a subject, and to dispoyle him of his kingly office of royall government.<sup>25</sup>

This seems also true of the statement that

If a subject conspire with a foraine Prince beyond the seas to invade the Realme by open hostility, and prepare for the same by some overt act, this is a sufficient overt act for the death of the King, for by this Act of Parliament in that Case there must be an overt act.<sup>26</sup>

And the emphasis upon the objective tendency of the act to further a plan of conduct appears in his explanation of the significance of the statute of 3 Henry VII, which made it a felony to plot the king's death:

By this Act it expressly appeareth by the judgement of the whole Parliament, that

<sup>25</sup> *Id.* 12. Note, however, the ambiguous use of the word "prove": in the last sentence of the quotation.

<sup>26</sup> *Id.* 14.

besides the confederacy, compassing, conspiracy, or imagination, there must be some other overt act or deed tending thereunto, to make it treason within the statute of 25 E. 3. And therefore the bare confederacy, compassing, conspiracy, or imaginations by words only, is made felony by this Act. But if the Conspirators do provide any weapon, or other thing, to accomplish their devilish intent, this and the like is an overt act to make it treason.<sup>27</sup>

So also when Coke pronounces that

A compassing or conspiracy to levy war, is no Treason, for there must be a levying of war *in facto*.<sup>28</sup>

he seems sharply to distinguish the overt act from the showing of intent since his statement clearly assumes that a treasonable intent appears, and yet the offense of levying war is not made out, for lack of the overt act. And he points up the sharp distinction between intent and act as separate elements of the crime, by citing the words of a proper indictment:

For first it is alledged according to this act, *Quod proditorie compassavit, & imaginatus fuit mortem & destructionem dñi regis, & ipsum dom. regem interficere, &c.* In the second part of the indictment is alledged the overt act, & *ad illam nephandam, & proditoriam compassionem, imaginationem, & propositum suum perficiend & perimplend,* and then certainly to set down the overt fact for preparation to take, and imprison the King, or any other sufficient overt act, which

<sup>27</sup> *Id.*, 38.

<sup>28</sup> *Id.*, 9.

of necessity must be set down in the Indictment.<sup>29</sup>

Thus Lord Coke may be cited, with some conviction, to both purposes; that the significance of the overt act is that it confirms the evidence of evil intent, or that it is relevant wholly apart from evidence of intent, in order to show that the defendant's guilt had moved from the realm of thought alone into that of action. Coke's attention was apparently not directed to the problem of defining the precise function of the overt act element, and hence his words must be taken in either case with caution. However, on the whole, in view of his over-riding emphasis on the distinct quality of the overt act element under the Statute of Edward III, it seems that he does not mean to insist that it be an act which in itself is evidence of the treasonable intent.

*(b) Treatises published in the 16th Century*

Hale comments frequently on the uncertain scope of "treason" at common law and during certain periods of legislative activity, notably under Richard II, and on the resultant uncertainty and insecurity of the individual. Thus, after stating the statute of 1 Henry IV, which restored the terms of the Statute of Edward III as the guide in defining the offense, he warns,

Now altho the crime of high treason is the greatest crime against faith, duty, and human society, and brings with it the greatest and most fatal dangers to the government, peace, and happiness of a kingdom,

<sup>29</sup> *Id.*, 127.

or state, and therefore is deservedly branded with the highest ignominy, and subjected to the greatest penalties, that the law can inflict; yet by these instances, and more of this kind, that might be given, it appears, 1. How necessary it was, that there should be some fixed and settled boundary for this great crime of treason, and of what great importance the statute of 25. E. 3 was, in order to that end. 2. How dangerous it is to depart from the letter of that statute, and to multiply and inhance crimes into treason by ambiguous and general words, as *aceroaching of royal power*, *subverting of fundamental laws*, and the like; and 3. How dangerous it is by construction and analogy to make treasons, where the letter of the law has not done it: for such a method admits of no limits or bounds, but runs as far as the wit and invention of accusers, and the odiousness and detestation of persons accused will carry men.<sup>30</sup>

He is clearcut, in pointing out that the policy and the terms of the Statute of Edward III limit the power of judges, praising

The great wisdom and care of the parliament to keep judges within the bounds and express limits of this act, and not to suffer them to run out upon their own opinions

<sup>30</sup>1 Hale 86. Note that Hale's language is such that it might be interpreted to caution merely against expanding the scope of treason by adding new substantive definitions, and not to embrace the same result when reached by more "liberal" construction of the familiar definitions or of the evidence requisite to satisfy them. But this interpretation seems too narrow, especially in view of the last sentence of the quotation. See also, *id.*, 82, 122, 151, 157, 293.

into constructive treasons, tho in cases, that seem to have a parity of reason (*like cases of treason*) but reserves them to the decision of parliament: this is a great security, as well as direction, to judges, and a great safeguard even to this sacred act itself.<sup>31</sup>

Despite these general assertions of the strength of the restrictive policy embodied in the basic Statute, Hale has little to say in specific explanation of the historic bases of that policy. His only detailed comment, however, seems to rest the policy on the abuse of "treason" in domestic factionalism:

And we need no greater instance of this multiplication of constructive treasons, than the troublesome reign of king *Richard II.* which, tho it were after the limitation of treasons by the statute of 25 *E. 3.* yet things were so carried by factions and parties in this king's reign, that this statute was little observed; but as this, or the other party prevailed, so the crimes of high treason were in a manner arbitrarily imposed and adjudged to the disadvantage of that party, that was intended to be suppressed; so that *de facto* that king's reign gives us as various instances of these arbitrary determinations of treasons, and the great inconveniences that arose thereby; as if indeed the statute of 25 *E. 3.* had not been made or in force. And tho most of those judgments and declarations were made in parliament; sometimes by the king, lords, and commons; sometimes by the lords, and afterwards affirmed and enacted, as laws; sometimes by a plenipotentiary power committed by

<sup>31</sup> *Id.*, 259.

acts of parliament to particular lords and others, yet the inconvenience, that grew thereby, and the great uncertainty that happened from the same, was exceedingly pernicious to the king and his kingdom.<sup>32</sup>

In expounding the meaning of the overt act element in the crime,<sup>33</sup> Hale frequently uses the sort of ambiguous terminology which we have seen take its start in Staundford and Coke. Thus when he says that the overt act is necessary to "prove", or "manifest", or "declare" the compassing of the king's death or the adhering to his enemies, this might imply that the act is relevant because it helps prove the intent, and that therefore only such an act as is some evidence of the intent will satisfy this requirement of the offense.<sup>34</sup> Like Coke, he does not, however, use even these doubtful terms regarding the levying of war.

Explaining the scope of the offense of compassing the king's death, he further notes

Tho the conspiracy be not immediately and directly and expressly the death of the king, but the conspiracy is of something that in all probability must induce it, and the overt act is of such a thing as must induce

<sup>32</sup> *Id.*, 83. Compare his strong criticism of the ruling of the judges, *101. Parl. H. R. 2.*, that the king could be said to be treasonably "compelled" when pressure was put on him only by the familiar political means of withholding supplies, or by persuasion or strong petition. *Id.*, 109-110; cf. 267.

<sup>33</sup> See *id.*, 121: "the overt act is an essential part of the indictment."

<sup>34</sup> See, e. g., passage quoted at note 43, *infra*; also, 91, 92, 107, 108, 110, 149, 151, 167.



it; this is an overt-act to prove the compassing of the king's death, \* \* \*

But this states what kind of an overt act will surely satisfy the requirements of proof, and does not necessarily exclude acts less forthright than those which "must induce" the king's death.

We have seen that Coke rejected spoken words as an overt act of treason in terms which might seem to imply that this was because they were inherently insufficient evidence of the treasonable intent, thereby mingling the two basic elements of the crime. Hale, more plainly restating Coke, objects to the use of spoken words for their intrinsic unreliability as proof of any element of such offense:

Regularly words, unless they were committed to writing, are not an overt-act within this statute. *Co. P. C.* p. 14; and the reason given is, because they are easily subject to be mistaken, or misapplied, or misrepeated, or misunderstood by the hearers.<sup>36</sup>

<sup>35</sup> *Id.*, 109.

<sup>36</sup> *Id.*, 111-112. The notes added by Hale's first editor, Emlyn, are much more clear on this point, and interesting as reflecting an early 18th century understanding of the nature of the requisite overt act. In note (k), p. 111, thus, Emlyn comments that even if certain passages cited by Staundford from Bracton and Britton could be deemed to declare spoken words sufficient overt acts at common law,

yet it does not follow, that they would be so by the statute of 25 E. 3. which expressly requires the proof of an overt-act, and consequently disallows the evidence of bare words, for *words* and *acts* are contradistinguished from each other. See *Co. P. C.* 14 in

But, he likewise, is not clearcut in his analysis, since for the further support of his position, he cites *Pyne's Case*, which both on its facts and opinion seems to turn on the finding that the spoken words, offered as the sole evidence in the case, were insufficient to make out the intent, without a ruling on their sufficiency as an overt act.<sup>37</sup>

*margin.* The preamble of 1 *Mariae*, cap. 1, sess. 1 makes it matter of complaint, that many had for words only suffered shameful death.

And in note (1), p. 112, Emlyn adds to Hale's explanation of the unreliable quality of testimony regarding spoken words, the comment that

This is one but not the only reason, for another reason was, because men in a passion or heat might say many things, which they never designed to do; the law therefore required, that in a case of so nice a nature, where the very intention was so highly penal, the reality of that intention should be made evident by the doing some act in prosecution thereof.

This comment finds evidence of spoken words alone to be insufficient for either of the two purposes the evidence is made to bear: there is deemed insufficient evidence of intent, but also there is not thought to be a sufficient step in execution. Cf. note (y), p. 116; note (b), p. 117.

<sup>37</sup> Cro. Car. 125. The sole evidence in this case was the speaking of words reflecting upon the ductability and intelligence of the king. The report states that

Upon consideration of the precedents of the statutes of treason it was resolved by the seven judges there named, and so certified to his majesty, that the speaking of the words there mentioned, tho' they were as wicked as might be, were not treason; for they resolved that, unless it were by some particular statute, no words will be treason; for there is no treason at this day but by the statute of 25 E. 3. for imagining

In two respects, however, Hale's analysis of the offense of compassing the king's death seems to make clear that the overt act need not be such as is evidence of a treasonable intent, and that it may even be "indifferent" in character. Thus, after developing the thesis that spoken words are not alone enough to make out an overt act of treason, he lays down these qualifications:

(1.) That words may expound an overt-act to make good an indictment of treason of compassing the king's death, which overt-act possibly of itself may be indifferent and unapplicable to such an intent; and therefore in the indictment of treason they may be joined with such an overt-act, to make the same applicable and expositive of such a compassing, as may plainly appear by many of the precedents there cited [in *Pyne's case*, Cro. Car. 125, q. v.].

(2.) That some words, that are expressly menacing the death or destruction of the king, are a sufficient overt-act to prove that compassing of his death, *M. 7 Car. B. R. Crohagan's case in Croke* [Cro. Car. 332], who being an Irish priest, 7 Car. 1 at Lisbon in Portugal, used these words, "*I will kill the king (innuendo dominum Carolum regem Angliæ) if I may come unto him,*" and in Aug. 9 Caroli he came into England for the same purpose. This was proved upon his trial by two witnesses, and for

---

the death of the king, &c. and the indictment must be framed upon one of the points in that statute; and the words spoken there can be but evidence to discover the corrupt heart of him that spake them; but of themselves they are not treason, neither can any indictment be framed upon them.

that his traitorous intent and the imagination of his heart was declared by these words, it was held high treason by the course of the common law, and within the express words of the statute of 25 E. 3. and accordingly he was convicted, and had judgment of high treason; yet it is observable, that there was somewhat of an overt act joined with it, namely, his coming into *England*, whereby it seems to be within the former consideration, namely, tho the coming into *England* was an act indifferent in itself, as to the point of treason; yet it being laid in the indictment, that he came to that purpose, and that in a great measure expounded to be so by his minatory words, the words coupled with the act of coming over make his coming over to be probably for that purpose, and accordingly applicable to that end.<sup>38</sup>

This passage might be interpreted to mean that the "indifferent" overt acts would not suffice, standing alone, without being coupled with obviously harmful words, here also regarded as in the nature of overt acts. But it seems a fairer reading, that the words are not treated as an essential part of the overt act in these cases; but only as evidence linking the overt act to the intention. Further, it is a fair inference from the foregoing quotation, and especially from the first explanation offered of *Crohagan's Case*, that what was really in Hale's mind in his general assertion of the insufficiency of spoken words as an overt act was a judgment that in many cases where the words were the only evidence in the case, they

<sup>38</sup> 12, 115-116.

were insufficient *qua* evidence of intent, rather than *qua* evidence of overt act.

Secondly, Hale declares that the mere meeting of persons, with the intent of plotting the king's death, is a sufficient overt act to make out the crime of compassing that end:

If there be an assembling together to consider how they may kill the king, this assembling is an overt-act to make good an indictment of compassing the king's death. This was *Arden's* case [1 Anderson 104], 26 *Eliz.* and accordingly it was ruled *Decem. 14 Caroli* at *Newgate* in the case of *Tonge* and other confederates [Kelyng, 17] \* \* \*

*Vide Anderson's Reports Placito 154*, which was the case of *Arden* and *Somerville* and others, who conspired the death of queen *Elizabeth*, resolved by all the justices, that a meeting together of these accomplices to consult touching the manner of effecting it was an overt-act to prove it, as well as *Somerville's* buying of a dagger actually to have executed it. \* \* \*

The fact that both of the foregoing propositions are laid down with reference to the overt act in compassing the king's death naturally raises the question whether they are peculiar to that branch of the Statute of Edward III. The second ruling, that a mere meeting with intent to plan the effectuation of a treasonable intent is a sufficient overt act, is, at any rate according to Hale, inapplicable to the crime of levying war

\* *Id.*, 119, 122.

against the king, for agreeing with Coke—he declares that

\* \* \* a bare conspiracy or consultations of persons to levy a war, and to provide weapons for that purpose; this, tho it may in some cases amount to an overt-act of compassing the king's death, yet it is not a levying of war within this clause of this statute. \* \* \*

Hale gives no more explanation of this than does Coke, and seems to rest the dogma simply on the statutory terms themselves: "the act, saith *levy guerre*".<sup>11</sup> The crime of, "adhering to the king's enemies \* \* \* giving them aid or comfort"

<sup>11</sup> *Id.* 131; cf. 135, 144, 148.

<sup>12</sup> *Id.* 130. Compare Coke, 10, where he explains that though 13 Eliz. cap. 1 declared a conspiracy to levy war to be treason,

\* \* \* it was resolved by all the Justices, that it was no treason within the statute of 25 E. 3. as hath been said. The words in this law are [*levie guerre*]. An actual Rebellion or Insurrection is a levying of war within this Act, and by the name of levying war is to be expressed in the indictment.

So also, regarding adherence, Coke merely says that

This is here explained, viz. in giving aid and comfort to the Kings enemies within the Realme or without

*Ibid.* The same reliance on the statutory terms as self-evident in scope appears in his terse declaration that under the words "so home counterface le grand Seale"

A Compassing, intent, or going about to counterfeit the great seale is no treason, but there must be an actual counterfeiting \* \* \*

*Id.* 15. Cf. Hale, 181.



seems stated no less bluntly; but neither Coke nor Hale raises the question whether a meeting of conspirators to plan such giving of aid or comfort would be an overt act of adherence.<sup>42</sup> One might argue that the first offense (compassing the king's death) is defined in a term referring to thought, and the other two in terms referring to action, and that this indicates that the danger involved in the first was regarded as greater, or the offense more heinous, so that the overt act requirement is properly satisfied, in the case of the first offense, by conduct less close to accomplishment of the

<sup>42</sup> Both seem to think the statutory terms concerning adherence to be so plain as to call for little discussion, and their analyses furnish little help in this connection. It has been noted that in his analytical table of the elements of the different branches of treason under Statute Edward III, Coke stated that both the crimes of compassing the king's death and adhering to his enemies involved the element of "declaring the same by some overt act"; but that he defined the other major offense simply as "Levying war against the King". Coke 3-4. Hale adopts this analysis at one point. (p. 91). But cf. *id.* 149-150. This verbal distinction is obviously a very slender support for arguing that a basic difference was intended in the elements of these offenses, however. But, Coke, 14, states that "If a subject conspire with a foraine Prince beyond the seas to invade the Realme by open hostility, and prepare for the same by some overt act, this is a sufficient overt act for the death of the King; for by this Act of Parliament in that Case there must be an overt act." This may imply that conspiracy to adhere to enemies is not per se a sufficient overt act for that charge, or even for a charge of compassing. As regards adherence, however, it is not clear whether Coke is referring to a foreign prince then at peace with England, in which case, of course, there would as yet be no "enemy" to whom to adhere.

treasonable intention than in the cases of the other two branches of the crime. At least as applied to modern conditions, however, this seems to place too much weight on the words alone, and the proposition that the offenses of levying war and adhering to enemies present less serious perils to the security of the community than that of compassing the king's death is dubious enough in the circumstances of the present-day state to cast the burden of proof on him who urges it. The Statute of Edward III has always been treated, as it was treated in the adoption of its words in American law, as declaring broad policy for an indefinite future, and one should, therefore, be slow to narrow it to the peculiar political circumstances of medieval or Renaissance England. Moreover, so far as the logical pertinence of Hale's analysis is concerned, a proper understanding of the significance of the overt act in any of the branches of treason makes his argument applicable to all. It is fallacious to hold that any act has a character in and of itself. What it means depends on many other facts, of memory, present perception, and logical prediction, in the mind of the observer. There is, therefore, no reason to believe that in the case of levying war or adhering to enemies, a person might not be proved to have committed acts highly dangerous to the security of the community, but which, in the absence of extrinsic evidence linking them to the actor's general purpose, would seem "innocent on their face". There is, in other words, nothing peculiar to the offense of compassing the king's death which would bring it about that only there might one be presented with acts "indif-

ferent" except when appraised in the light of accompanying words or other evidence of intent. Whether Lord Chief Justice Hale would agree to this analysis must be admitted to be conjectural, for he does not spell out his thought more directly than is indicated in the passages quoted. However, in discussing the action taken in *Rot. Parl. 21 R. 2 n. 18*, Hale seems to indicate quite clearly that he did not believe that there was any fundamental difference in the significance of the overt act element in the offenses of compassing the king's death and levying war against him. The Parliament had there declared

Chescun qe compasse, et purpose la mort le roy, ou de lui deposer, ou de susprendre son homage liege, ou celui, qe levy le people, et chivache encountre le roy a faire guerre deins son realme, et de ceo soit dūment attaint, et adjudge en parlement, soit adjudgez come traytor de haut treason encountre la corone \* \* \*

Hale declares of this act that

These four points of treason seem to be included within the statute of 25 E. 3 as to the matter of them \* \* \*; but with these differences, viz \* \* \* 3. But that, wherein the principal inconvenience of this act lay, was this, that whereas the statute of 25 E. 3, required an overt-act to be laid in the indictment, and proved in evidence, this act hath no such provision, which left a great latitude, and uncertainty, in point of treason, and without any open evidence, that could fall under human cognizance, subjected men to the great punishment of treason for their very thoughts, which with-

out an overt-act to manifest them are not triable but by God alone.<sup>43</sup>

Kelyng and Hawkins give little which further illuminates the definition of the offense.<sup>44</sup> Kelyng

<sup>43</sup> Hale, 85; *cf.* 111. This act and its repeal by Hen. IV, ch. 10, are relied on by Judge Hand in *U. S. v. Robinson*, 259 Fed. 685, 689 (S. D. N. Y. 1919), for his argument that the overt act must evidence intent.

<sup>44</sup> Kelyng is a narrative of several treason cases under Charles H. Hawkins foregoes discussion of the political policies involved in the issue of strict or liberal construction of the crime, limiting himself largely to digest-style paragraphs on the statutes and decisions. The overt act is a distinct element under each branch of "treason". 1 Hawkins 92. Words may serve to explain an act in itself indifferent, *id.*, 94; and a meeting of conspirators is a sufficient overt-act to make out a compassing the king's death, *id.*, 92; Kelyng, \*15, 17, 20. Both are as ambiguous as previous writers on the question of whether words are not generally a sufficient overt act. See Hawkins, 93, 94, 96; *cf.* Kelyng, \*13. But Hawkins' comment on Peacham's Case, where a writing was the sole evidence, seems to point out that such evidence must be viewed, respectively, in its function of showing intent, and of establishing an overt act, for he finds the evidence in that case inadequate on these distinct grounds:

\* \* \* it has been holden, that written words in a sermon or other writing may amount to overt acts of compassing the king's death, though the same neither actually were, nor ever were intended to be, preached or published. But this opinion seems to be over-severe; for though it be true that *scribere est agere*, yet surely it cannot with any propriety be said, that to write in such a private manner *est aperte agere*, and it seems rigorous to make that amount to a malicious design against the king, which perhaps was only done by way of amusement or diversion.

Hawkins, 93.

does add great emphasis to the doctrine that a meeting of conspirators is a sufficient overt act in compassing the king's death, by the resolutions of the judges which he reports concerning knowing attendance upon a meeting of conspirators. Thus in the consideration of the case of Tong and others, he notes that.

It was resolved by all the Judges, that the meeting together of Persons, and consulting to destroy the King, was of itself an Overt Act to prove the compassing the King's Death.

It was resolved that where a Person knowing of the Design does meet with them, and hear them discourse of their traitorous Designs, and say or act nothing; This is High-Treason in that Party; for it is more than a bare Concealment, which is *Misprision*, because it sheweth his liking, and approving of their Design; but if a Person not knowing of their Design before, come into their Company, and hear their Discourses, and say nothing, and never meet with them again at their Consultations, that Concealment is only *Misprision* of High-Treason. But if he after meet with them again, and hear their Consultations, and then conceal it, this is High-Treason. For it sheweth a liking, and an approving of their Design \* \* \* [citing Sir Everard Digby's Case, 1 St. Tr. 234] <sup>45</sup>

So, also, he reports that in considering the case of the conspiracy to levy war in the North Riding of Yorkshire,

\* Kelyng. \*17.

It was agreed that the bare knowledge of Treason, and the concealment of it was not High-Treason, but Misprision of Treason. But in Case any thing be proved upon Evidence, that the Party liked or approved of it, then it is High Treason; or if the Party knew of the Design, and after such Knowledge, met with the Conspirators at their Consultation; or if he went knowingly to their Consultations several Times, this is Evidence of his Approbation of the Design, and is High Treason.<sup>46</sup>

These passages are not without ambiguity, as to whether the emphasis is on the evidence as evidence of intent, or as adequate evidence, also, of an overt act; but since Kelyng notes the general, basic ruling, that a conspiratorial meeting is a sufficient overt act, it seems that the intent is to find the more borderline case to involve a sufficient overt act as well. Though the broad doctrine reported by Kelyng might be thought of dubious authority, since it originates in the period of reprisals following the Restoration, it has been accepted without such criticism by modern English authority.<sup>47</sup>

Foster gives us the most illuminating discussion of the 18th century writers on the nature of the overt act element in treason. His analysis rests on the familiar declaration that wise policy calls for careful definition of the scope of the offense.

<sup>46</sup> *Id.*, \*21.

<sup>47</sup> See 4 Stephen's Commentaries on the Laws of England (18th ed., London, 1925) 457; 8 Holdsworth, History of English Law (2d ed., London, 1937) 323.



in the interest of individual security.<sup>48</sup> Thus he makes it clear that an overt act is an essential element of the crime under each branch of the Statute of Edward III.<sup>49</sup> But, despite his fundamentally cautious approach to the definition of the offense, he does not permit it to be wrongly narrowed by a muzzy analysis of the relation of its elements to each other. He insists that the overt act is required, not merely as cumulative evidence of the intent, but for the distinct purpose of demonstrating that the defendant had moved from the realm of thought into that of execution.

The words of the statute descriptive of the offence must be strictly pursued in every indictment for this species of treason. It must charge, that the defendant did traitorously *compass and imagine &c.*, and then go on and charge the several overt acts as the means employed by the defendant for executing his traitorous purposes. For the compassing is considered as the treason, the overt acts as the means made use of to effectuate the intentions and im-

---

<sup>48</sup> Foster, 207, 237. There is an intimation that he views the restrictive policy as based on the desire to limit abuse of "treason" in purely domestic factionalism, in his comment that the statute of 1 Ph. & M., in "reducing all treasons to the standard of the 25 E. III", brought it about that thereby "the subject was secured in his journey through life against the numerous precipices which the heat and distemper of former times had opened in his way \* \* \*". *Id.*, 237. Compare the breadth which he was eager to give offenses of trafficking with an external enemy, notes 58 and 60, *infra*.

<sup>49</sup> *Id.*, 220.

aginations of the heart: and therefore in the case of the régicides the indictment charged, that they did traitorously compass and imagine the death of the King; and the taking off his head was laid, among others, as an overt act of compassing; and the person who was supposed to have given the stroke was convicted on the same indictment.

From what hath been said it followeth, that in every indictment for this species of treason, and indeed for levying war, or adhering to the King's enemies, an overt act must be alleged and proved. For the overt act is the charge, to which the prisoner must apply his defence. \* \* \*

Foster particularly deserves our gratitude for introducing the first clarity into the discussion of words and writings as overt acts. He points out that, considered as evidence of intent, mere spoken words are generally unreliable evidence, because of the likelihood that they "are often the effect of mere heat of blood"; and that, considered as evidence of anything, they are unreliable because they "are always liable to great misconstruction from the ignorance or inattention of the hearers, and too often from a motive truly criminal."<sup>50</sup> So much is familiar. Foster pushes beyond prior analyses when he clearly points out that the objection to basing treason on unpublished writings (*Peacham's* and *Sidney's* cases), is that there the written words are being made to do double duty as evidence both of intent and overt act, and that

<sup>50</sup> *Id.*, 194; compare the third paragraph quoted at note 56.

<sup>51</sup> *Id.*, 200.

they will generally not, of themselves, bear such weight. But, if other satisfactory evidence of intent is present, the writing, though "unpublished," suffices as an overt act:

In Mr. *Sidney's* case it was said, *Scribere est agere*. This is undoubtedly true under proper limitations, but it was not applicable to his case. Writing being a deliberate act and capable of satisfactory proof certainly may, under some circumstances, *with publication*, be an overt act of treason: and I freely admit, that had the papers found in Mr. *Sidney's* closet been plainly relative to the other treasonable practices charged in the indictment, they might have been read in evidence against him, though not published.

The papers found in Lord *Preston's* custody, those found where Mr. *Layer* had lodged them, the intercepted letters of Doctor *Hensey*, were all read in evidence as overt acts of the treason respectively charged on them; and *William Gregg's* intercepted letter might, in like manner, have been read in evidence, if he had put himself upon his trial. For those papers and letters were written in prosecution of certain determinate purposes, which were all treasonable and then in contemplation of the offenders, and were plainly connected with them. But papers not capable of such connection, while they remain in the hands of the author unpublished, as Mr. *Sidney's* did, will not make a man a traitor. Lord *Hale* \* \* \* mentioneth two circumstances as concurring to make words reduced into writing overt acts of compassing the King's death, *that they be published, and that they import such compassing.*

True it is, that in *Peacham's* case a Ms. sermon, in which were some treasonable passages, found in his study, never, for aught appearing, preached or published or intended to be so, was thought to bring him within this branch of the statute; and accordingly he was found guilty, *but not executed*. For whatever rule the court of King's Bench, where he was tried, might lay down, "many of the judges, saith *Croke*, were of opinion, that it was not treason." This case therefore weigheth very little; and no great regard hath been paid to it ever since.<sup>52</sup>

The reference in the second paragraph of this quotation, to Hale, introduces the familiar confusion, as to whether the overt act must evidence the intent; but in the context of Foster's analysis, it seems a fair inference that he here uses Hale's words—whether rightly or wrongly—to mean that the overt act must be adequately related, by evidence, to the evidence of the plan or design into which the act fits. This same lingering confusion in terminology appears when Foster, referring now to mere spoken words, says, after detailing the reasons already noted as to their general unreliability as evidence,

And therefore I choose to adhere to the rule which hath been laid down on more occasions than one since the revolution, that loose words, *not relative to any act or design*, are not overt acts of treason. But words of advice or persuasion, and all consultations for the traiterous purposes treated of in this chapter are certainly so.

<sup>52</sup> *Id.*, 198-199.

They are uttered in contemplation of some traiterous purpose actually on foot or intended, and *in prosecution* of it.\*

¶ If the thesis here advanced as to Foster's basic line of analysis is correct, he should more properly say that in the case put, the "loose words" are not adequate evidence of intention, rather than that they are not sufficient overt acts; for in the same passage, it will be seen that he reiterates that mere spoken words are a sufficient overt act when linked to other, satisfactory evidence of a treasonable design into whose execution they fit. That this is a reasonable interpretation of Foster is supported by his comments on *Croliagan's Case*, in which he plainly insists that one must not confuse the appraisal of the adequacy of words as evidence of intent with their sufficiency as an overt act:

\* \* \* words connected with facts, or expressive of the intention of the speaker, may, under some circumstances, bring him within the statute of treasons. *Croliagan* being beyond sea said, "I will kill the King of *England*, if I can come at him", and the indictment, after setting forth the words, charged, that *he came into England for that purpose*.

In this case the words, though laid in the indictment as one of the overt acts, could not be so properly deemed an overt act of treason, as an evidence against the man out of his own mouth, *QUO ANIMO he came into England*. The traiterous intention, proved by his words, converted in action,

<sup>58</sup> *Id.*, 200.

innocent in itself, into an overt act of treason.

Foster criticizes Kelyng for stating this case as involving words alone as an overt act:

It is true, the words were laid as an overt act, but they were not the *only* overt act laid; for the indictment farther charged, that the man came into *England* for the purpose of killing the King.

And he continues his criticism of Kelyng in terms which clearly establish his distinction between the evidence of intent and of an overt act:

The author in the same page endeavoureth to put writings and words upon one and the same foot: "Words, saith he, set down in writing are an overt act to prove the compassing the King's death, and words *spoken* are the same thing, if *they be proved*; and words are the natural way for a man whereby to express the imagination of the heart."

His Lordship reasoneth in this passage as if he considered the overt acts, required by the statute, merely as *matters of evidence*, tending to discover the imaginations of the heart. Overt acts undoubtedly do discover the man's intentions; but, I conceive, they are not to be considered merely as evidence, but as *the means made use of to effectuate the purposes of the heart*. With regard to homicide, while the rule *voluntas pro facto* prevailed, the overt acts of compassing were so considered. In the cases cited by *Coke* there were plain flagitious attempts upon the lives of the parties marked out for destruction: and though in the case of the King overt acts of less malignity, and having a more remote tendency to his destruction, are with great propriety,



deemed treasonable; yet still they are considered as *means to effectuate*, not barely as *evidence* of the treasonable purpose. Upon this principle words of advice or encouragement, and, above all, consultations for destroying the King, very properly come under the notion of *means made use of* for that purpose. But loose words not relative to facts are, at the worst, no more than bare indications of the malignity of the heart.<sup>55</sup>

It follows that Foster has no difficulty in contemplating that actions harmless on their face may yet be sufficient overt acts to make out the offense, when linked to adequate evidence of the treasonable design into which they fit. This appears from his reference in the quotation above to Crohagan's coming into England as "an action, innocent in itself", but converted into treason by the evidence of intention. It appears also in his repeated statement that the mere fact of a meeting of several persons, when coupled with evidence that their intention in meeting was to plan the king's death, is a sufficient overt act; and in his approval of the doctrine that attendance at a meeting with knowledge of its treasonable purpose, or return to a meeting after knowledge is gained of its treasonable purpose, is treason and not merely misprision of treason.<sup>56</sup>

Foster's discussion raises the same question noted in connection with Hale, whether, since his analysis refers almost entirely to problems under that branch of the Statute of Edward III dealing

<sup>55</sup> *Id.*, 202, 203.

<sup>56</sup> *Id.*, 195, 206; see also matter quoted at note 50, *supra*, and note 56, *infra*.

with compassing the king's death, it extends as well to the crimes of levying war or adhering to enemies. There is material in Foster's discussion of the first offense which may reasonably be construed to mean that he viewed it as of specially broad scope, perhaps validating as overt acts conduct more remote from the intended object than in the other crimes:

The antient writers, in treating of felonious homicide, considered the felonious intention manifested by plain facts, not by bare words of any kind, in the same light in point of guilt, as homicide itself. The rule was *voluntas reputatur pro facto*: and while this rule prevailed, the nature of the offence was expressed by the term *compassing the death*.

This rule hath been long laid aside as too rigorous in the case of common persons. But in the case of the King, Queen, and Prince, the statute of treasons hath, with great propriety, retained it in it's full extent and rigour: and in describing the offence hath likewise retained the antient mode of expression \*

The principle upon which this is founded is too obvious to need much enlargement. The King is considered as the head of the body-politick, and the members of that body are considered as united and kept together by a political union with him and with each other. His life cannot, in the ordinary course of things, be taken away by treasonable practices without involving a whole nation in blood and confusion; consequently every stroke levelled at his person is, in the ordinary course of things, levelled at the publick tranquillity. The

law therefore tendereth the safety of the King with an anxious concern, and, if I may use the expression, with a concern bordering upon jealousy. It considereth the wicked imaginations of the heart in the same degree of guilt as if carried into actual execution, from the moment measures appear to have been taken to render them effectual; and therefore, if conspirators meet and consult how to kill the King, though they do not then fall upon any scheme for that purpose, this is an overt act of compassing his death; and so are all means made use of, be it advice, persuasion or command, to incite or encourage others to commit the fact, or to join in the attempt; and every person who but assenteth to any overtures for that purpose will be involved in the same guilt.<sup>50</sup>

It is in this connection that he first mentions *Lord Preston's Case*:

Offences which are not so personal, as those already mentioned, have been with great propriety brought within the same rule; as having a tendency, though not so immediate, to the same fatal end; and therefore the entering into measures in concert with foreigners and others in order to an invasion of the kingdom, or going into a foreign country, or even purposing to go thither to that end *and taking any steps in order thereto*,—these offences are overt acts of compassing the King's death.<sup>51</sup>

However, his approval of the scope of the ruling there is given in terms of implying that he is fully ready to see the same liberality applied to traffic

<sup>50</sup> *Id.* 193, 194-195.

<sup>51</sup> *Id.* 196.

with an external enemy, whenever it can be brought under another branch of the statute:

The offence of inciting foreigners to invade the kingdom is a treason of signal enormity. In the lowest estimation of things and in all possible events, it is an attempt, on the part of the offender, to render his country the seat of blood and desolation; and yet, unless the powers so incited happen to be actually at war with us at the time of such incitement, the offence will not fall within any branch of the statute of treasons, except that of compassing the King's death: and therefore, since it hath a manifest tendency to endanger the person of the King, it hath, in strict conformity to the statute, and to every principle of substantial political justice, been brought within that species of treason of compassing the King's death: *ne quid detrimenti respublica capiat*.<sup>38</sup>

In the light of this comment, it is impossible to think that Foster would hold that the same action held a sufficient overt act of compassing the king's death, in *Lord Preston's Case*, was not equally good to make out the offense of adherence to the king's enemies, given the other requisite circumstances. This is made clear by his adducing the indictment in that case, with approval, as an example of the fact that, contrary to Coke's mechanical logic, an offense falling under one branch of the statute may be deemed an overt act of a different type of treason:

\* \* \* in *Lord Preston's case*, before cited, he and the other gentlemen were in-

<sup>38</sup> *Id.*, 196-197.

dicted upon both branches of the statute, *compassing the death, and adhering; and the composing, procuring, and secreting the treasonable papers, their taking boat to go on board the smack, and carrying the papers with them in order to be made use of in France for the treasonable purposes charged in the indictment,—these facts were all laid as overt acts of both species of treason.*<sup>59</sup>

That Foster would not require a stricter showing of an overt act in the crimes of levying war or adherence to enemies than in that of compassing the king's death, is further indicated by his strong approval of the doctrine that the former offenses, as much as the last, are made out, where it is attempted to send supplies or information to rebels or enemies,

though the money or intelligence should happen to be intercepted: for the party in sending did all he could; the treason was complete *on his part, though it had not the effect he intended.* [citing cases]

The cases cited \* \* \* did not in truth turn singly upon the rule here laid down, though I think the rule may very well be supported. For *Gregg* was indicted for *compassing the death* of the Queen, and also for *adhering to her enemies*; and *Hensley's* indictment was in the same form, and so was Lord *Preston's* \* \* \*; and the writing and sending the letters of intelligence, which, in the cases of *Gregg* and *Hensley*, were stopped at the post-office, was laid as an overt act of both the species of treason: so that admitting for argument's

<sup>59</sup> *Id.* 197-198.

sake, which is by no means admitted, that it was not an overt act of *adhering*, since the letters never came to the enemy's hands and consequently *no aid or comfort* was actually given, yet the bare writing and sending them to the post-office, in order to be delivered to the enemy, was undoubtedly an overt act of the other species of treason. In *Gregg's* case the judges did resolve, that it was an overt act of both the species of treason charged on him; and in *Henscy's* the court adopted that opinion and cited it with approbation.<sup>60</sup>

As was suggested in the discussion of the same point in *Hale*, it would seem a difficult argument to maintain, that, at least in the case of trafficking with enemies in time of war, the safety of the state demanded less broad definition of the overt act in the case of adherence to enemies than in that of compassing the king's death. There is nothing in Foster's chapter on levying war or adhering to enemies which suggests a policy of more closely limiting the scope of those offenses, except for his evident caution regarding the broad extension of the concept of constructive levying of war as a means to proceed against purely domestic disturbances.

However, the specific issue, whether a meeting with intention to plan treason, is a sufficient overt act of levying war or adhering to enemies, is not clearly resolved in Foster. He does not discuss the doctrine of previous writers, that a conspiracy to levy war is not a sufficient overt act to establish that particular offense, though he does declare it to be a sufficient overt act in con-

<sup>60</sup> *Id.*, 217-218. /



passing the king's death. However, developing a brief reference in Hale, Foster states a rule regarding the trial of accessories in treason which may imply that a meeting is not an adequate overt act to establish the crimes of levying war or adhering to enemies. Though in treason all are principals, as concerns the degree of guilt and of punishment, he argues that, except where the charge is compassing the king's death, one accused of advising or encouraging the commission of another of the treasons should be tried only after the principal actor:

For instance, *A.* adviseth *B.* to counterfeit the King's coin or seals, or indeed to commit any of the offences declared treason by the 25 *Edw. III.*, and furnisheth him with means for that purpose: (that species of treason which in judgment of law falleth within the clause of compassing the death of the King, Queen, or Prince always excepted;) if *B.*, in consequence of this advice and encouragement, doth the fact, *A.* is a principal in the treason; for such advice and assistance in the case of felony would have made him an accessory before the fact; and in high treason there are no accessories, all are principals. But if *B.* forebeareth to commit the fact, to which he is incited, *A.* cannot be a traitor merely on account of this advice and encouragement, though his behavior hath been highly criminal; for bare advice or incitement, how wicked soever, unless in the cases already excepted, will not bring a man within the statute, where no treason hath been committed in consequence of it.

\* \* \* \* \*

\* \* \* with regard to every instance of

incitement, consent, approbation, or previous abetment in that species of treason which falleth under the branch of the statute touching the compassing of the death of the King, Queen, or Prince, every such treason is in it's own nature, independently of all other circumstances or events, a complete overt-act of compassing; though the fact, originally in the contemplation of the parties, should never be effected, nor so much as attempted \* \* \* <sup>61</sup>

Blackstone is disappointing in his analysis of the nature of the overt act in treason, and gives us nothing but summary restatements of the authorities which we have already examined. In view of the influence of his work in America, however, it is worth while to notice the points which he particularly makes. The desirability of a policy restrictive of the scope of the offense is briefly stated in familiar terms, with the addition of a quotation from Montesquieu, which subsequently also turns up in James Wilson's law lectures in Philadelphia in 1790.<sup>62</sup> An overt act must be

<sup>61</sup> *Id.*, 210, 342, 346. Coke does not discuss this question. 1 Hale 613, may imply this point, though Emlyn's pointed reference to the ruling in *Somerville's case*, 1 Anderson 109, on the distinction regarding a charge of compassing the king's death, indicates that Hale's editor believed that the learned author had overlooked the matter. 4 Blackstone 35-36 makes the point that the aider in compassing the king's death has *ipso facto* committed the principal crime. Concerning Foster's underlying caution regarding the scope of constructive levying of war, see Foster, 219.

<sup>62</sup> Blackstone, 75, 83, 85, 86. At p. 86 is the reference to "newfangled" treasons, which seems probably behind Madison's similar reference in *The Federalist*.

shown under each branch of the Statute of Edward III.<sup>63</sup> There is no satisfactory analysis of the distinction between the evidence of intent and that of the overt act, the statement of the problem being put with an ambiguity which we have seen begin with Staundford:

But, as this compassing or imagination is an act of the mind, it cannot possibly fall under any judicial cognizance, unless it be demonstrated by some open, or *overt*, act. And yet the tyrant Dionysius is recorded to have executed a subject, barely for dreaming that he had killed him; which was held for a sufficient proof, that he had thought thereof in his waking hours. But such is not the temper of the English law; and therefore in this, and the three next species of treason, it is necessary that there appear an open or *overt* act of a more full and explicit nature, to convict the traitor upon \* \* \*

Likewise ambiguous, is his explanation that "words spoken amount only to a high misdemeanor, and no treason", in which he mingles criticism of their unreliability as evidence in general, and as evidence of intent in particular, with the usual distinction that "*scribere est agere*".<sup>65</sup> There is, at any rate, nothing in Blackstone clear enough to cast material doubt on the analysis which we have seen in Foster. And Blackstone goes so far toward recognizing the distinction between the overt act and the evidence of intent, as to approve the rulings that a mere

<sup>63</sup> *Id.*, 79.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Id.*, 79, 80.

meeting is a sufficient overt act, where there is evidence of the intent therein to plot the king's death; and that the mere fact of attendance at a meeting known to be treasonable, or the fact of return to a meeting once such knowledge has been gained, make out treason.<sup>66</sup>

(c) *Treatises Published in the 19th and 20th Centuries*<sup>67</sup>.

For all practical purposes, detailed analytical treatment of the law of treason has not interested

<sup>66</sup> *Id.*, 79, 120.

<sup>67</sup> This section is based on the works hereafter listed. Only those books examined which contained some significant reference to the subject are noted.

Archbold's Pleading, Evidence & Practice in Criminal Cases (31st ed. Butler and Garsia, editors. London, 1943).

Crabb, History of English Law (1st Am. Ed. Burlington, 1831).

Chitty, Practical Treatise on the Criminal Law (3 vol. 2d ed. London, 1826) (4th Am. ed. Springfield, 1841).

East, Treatise of the Pleas of the Crown (2 vol. London, 1803) (Philadelphia, 1806).

Holdsworth, History of English Law (2d ed. 12 vol. London, 1937).

Jenks, Short History of English Law (5th ed. London, 1938).

Luders, Considerations on the Law of High Treason in the Article of Levying War (Bath, 1808).

Plucknett, Concise History of the Common Law (3d ed. London, 1940).

Pollock and Maitland, History of English Law (2 vol. Cambridge, 1895).

Reeves, History of the English Law from the Time of the Saxons to the End of the Reign of Philip and Mary (4 vol. London, 1814-1829).

Stephen, History of the Criminal Law of England (3 vol. London, 1883).

Stephen's Commentaries on the Laws of England (4 vol. 1st ed. London, 1925).

writers of standard texts since the 18th century; and we have only meager evaluations of the issues of policy involved even from the historians. This is a natural reflection of a period of great political stability; and the Victorian confidence in an ordered world, in which civilization was identified with western Parliamentary government, speaks with naive assurance in Sir James Fitzjames Stephen's apology for the extremes of 16th and 17th century "treasons":

All these acts were either temporary, or have in one way or another long since expired, and they exercised little or no permanent influence on our law. I have referred to them so fully partly on account of their historical interest, partly because they illustrate in a striking manner the nature of one class of political offences. Convulsions and revolutions have occurred in the history of every nation. Each party in turn, and in particular every successful party, is from the nature of the case obliged to treat the prosecution by their antagonists of the political views and objects which they have at heart, and even in some cases the open avowal of those views, as crimes of the highest nature. It seems to me that such legislation can be fairly criticised only by considering two things, namely, first, the substantial merits of the quarrel, and secondly, the efficiency and approach to necessity of the means employed for the attainment of the end proposed. The Reformation and the great political revolutions which have followed it were the stormy periods in human history, and the legislation by which different parties have done their best to maintain their respective views in their own dominions,

are like orders given by a military commander in time of war. To criticise them upon the false supposition that they were intended to last for an indefinite time, and to apply to the normal state of society, is to misunderstand them pedantically.<sup>65</sup>

The 19th century historians introduce a desirable realism into the discussion of the policy bases of the Statute of Edward III, when they point out that the Parliament's wish to limit the definition of "treason" seems to have stemmed rather from the urge to limit the occasions on which land would forfeit directly and finally to the King, than from any notion of preserving political liberties.<sup>66</sup> But, while noting the politically liberal tradition which became attached to the Statute of Edward III, the typical 19th century discussion does not find it necessary to spend upon this theme the eloquence of great conviction. The alert vigilance of the Philadelphia convention of 1787 seems to have little counterpart in this succeeding period. The historians do, however, focus on the field of domestic politics as the area in which the restrictive policy of the Statute of Edward III has its modern importance.<sup>67</sup> But they place equal

<sup>65</sup> 2 Stephen 262-263; cf. *id.* 251. It may be significant that Stephen begins his discussion with a strong assertion of the importance of defending the basic organization of the community. *Id.*, 241-242; cf. 4 Holdsworth 493.

<sup>66</sup> Luders, 10; 2 Stephen 247; 2 Pollock and Maitland 508; 2 Holdsworth 449.

<sup>67</sup> 3 Reeves, 207, 208, 217, 234-235; 4 *id.* 273, 281, 297; 2 Stephen 247 ("Probably the great importance of the Act of Edward as a protection to what we should now call political agitation and discussion, was hardly recognized till a much later time."); 2 Pollock and Maitland 508; 3 Holdsworth 287, 290, 291; 8 *id.* 309; but cf. *id.* 310.



stress on the importance of protecting the existence of the state, and in this view find the terms of the Statute of Edward III to be "worded too narrowly, if it is to be construed literally."

The post-18th century writers add nothing to clarify the analysis of the overt act element of the crime. There is recognition that the overt act is a separate element in the offense; indeed, this is so plainly established, in net, by the earlier treatises that it could scarcely be subjected to open question at this date.<sup>2</sup> But the familiar ambiguous language, describing the function of the overt act as being to "prove", "manifest", "declare" the treason, is scattered through all of these works; and some of them contain references which would suggest that, at least in borderline cases, the overt act must be some evidence of treasonable intent.<sup>3</sup> It is also, however, a fair summary of the evidence to say that this latter

<sup>2</sup> 2 Stephen 263; 4 Holdsworth 496, 498; 8 *id.* 310.

<sup>3</sup> 3 Reeves 408; 5 *id.* 104; 1 East 58; 4 Stephen's Commentaries 150; Archbold 1067, 1073, 1077.

<sup>4</sup> See 1 East 69, 119; 4 Stephen's Commentaries 150; 8 Holdsworth 309, 311, 315; *cf. id.* 317. From the fact that this ambiguous terminology is almost invariably used in analysis of the offense of compassing the king's death, one might infer that the writers regard the overt acts involved in the other branches of treason to be so clearly evidence of treasonable intent as not to require such comment. But *cf. A Treatise upon the Law and Proceedings in Cases of High Treason, &c.* By a Barrister at Law (London, 1793; printed as an appendix to Kelyng's Crown Cases—reprint, Lond. (1873) 106: "If the treason consists not in the intention, but in the act, as levying war, then it must be laid to have been done traiterously", citing *Cranburn's Case*, 2 Salk. 633.

theory never emerges beyond the stage of innuendo or implication, in the post-18th century writings. And there is recognition that, at least under the charge of compassing the king's death, conduct, indifferent on its face, notably mere meetings, may be a sufficient overt act, when linked to proper evidence of treasonable intent. The only references to ambiguous or indifferent conduct as overt acts come under this head of compassing the king's death, and though the writers do not attempt to spin any very explicit theory of the special breadth of this charge, it is quite clear that they all regard it as the broadest category of treason. Holdsworth comes closest to open disapproval, on policy grounds, of the idea that "harmless" conduct may suffice for the overt act element, and he implies emphasis on the fact that the broadest cases have been under the charge of compassing the king's death. This seems the undertone of his comments on *Craghan's Case*:

\* \* \* the court seems to have laid some stress upon the facts that the words were accompanied by the overt act of coming to England, and that he had used scornful words when arrested; and this is the manner in which the case was explained and justified by later lawyers. It followed that words could give a treasonable colour to an otherwise innocent overt act. It is, therefore, not surprising that, in 1660, the judges showed a tendency to minimize the importance of the difference between written and spoken words \* \* \*

---

\* 8 Holdsworth 316.

This underlying unfriendly note appears also in his comments on *Lord Preston's Case*:

But, except in these two cases [spoken or unpublished written words not linked to a treasonable design], the seventeenth-century decisions, extending the constructive interpretation of this clause, were adopted, and even carried further, after the Revolution. And, here again, the extension was probably inevitable. If a conspiracy to levy war, and the publication of a writing advocating the deposition of the king, or merely arguing that it is lawful to depose him, are overt acts which can be given in evidence to prove the compassing of his death, it will be difficult to draw the line at these acts. It will be difficult to rule out any acts done in preparation for any other act, which, if accomplished, will be an overt act. That no attempt was made to draw the line is clear from the case of Lord Preston.

Quoting Foster's summary, that "Every step taken for those purposes was an overt act", he further comments:

The last sentence contains the gist of the matter. It comes to this—every act, however remotely connected with an overt act of compassing the king's death, is itself an overt act. As the future Lord Eldon confessed, when, as attorney-general, he was prosecuting Hardy in 1794, any act which showed that the person doing it intended "to put the king in circumstances in which, according to the ordinary experience of mankind, his life would be in danger," might be given in evidence as an overt act of compassing his death. It followed that this clause of the statute could be made to

cover the ground covered both by the clause against levying war against the king, and by the clause against adhering to his enemies.

These remarks should be compared with the same author's emphasis on the basically broader character of the statutory terms regarding the offense of compassing the king's death:

Even in the mediaeval period, the judges had seen that the fact that the gist of the offence was an intention to kill the king,

14. 317-318. Compare 2 Stephen 267, which mentions Lord Preston's Case with the comment that "After the Revolution of 1688 the fictitious interpretation of the offence of compassing the king's death was carried much further than it had been under the Stuarts." He states that in the passage from Foster, quoted at note 57, *supra*, that author "proceeds to carry the law laid down in [Lord Preston's Case] \* \* \* a step further", underlining the last clause of Foster's paragraph, and continues:

Foster follows Coke and Hale in holding that "levying war" is an overt act of compassing, and that conspiring to levy war in one sense of the expression is so too. Indeed, he goes so far as to say that "a treasonable correspondence with the enemy" is an act of compassing the king's death, and he refers in support of this to Lord Preston's case, and also to the case of one Harding, in which it was held on a special verdict that enlisting men in England and sending them abroad to join the French forces in an attempt to dethrone King William III was an imagining of his death.

Neither Stephen nor Holdsworth takes note of the fact that the overt acts laid in Lord Preston's case were under a charge of adhering to the King's enemies as well as of compassing his death. See notes 58 and 59, *supra*.

could be used to extend its scope; for they had held that the mere speaking of words might be an overt act which evidenced such an intention. They had seen as clearly as their successors that such an intention can be proved only by overt acts. For the thought of man is not triable; and that the statute could be extended by inferring an intention to kill from overt acts which were only remotely connected, if they were connected at all, with a formed intention to kill the king. \* \* \*

\* \* \* the fact that it was the intention to kill the king, and not his murder, which was made treason, was the main reason why this clause could be so extensively construed. \* \* \*

To fill out the picture it may be worth noting that, referring to the crime of adherence to the king's enemies, Holdsworth points out that this clause "has not been extended by construction in the same way as the first two clauses." He makes no argument, however, to show that there are policy considerations supporting this divergence in the history of the various branches of the Statute of Edward III. Archbold does indicate a

---

\* 8 Holdsworth 309, 311.

\* *Id.*, 307. Compare 2 Stephen 282: "Instances of this offence have been very rare in our history. England, owing to its insular position, has not for centuries been the scene of war carried on with a foreign enemy \* \* \* Hence the offence of adhering to the king's enemies—an exceedingly vague expression—has been committed only by a few spies who have in the time of war been detected in giving information to foreign enemies \* \* \* No questions of legal or constitutional interest have arisen on this branch of the act of Edward III to my knowledge."

difference in scope between the crime of adhering to enemies and that of compassing the king's death, when he asserts that a conspiracy to adhere is not treason under that branch of the statute any more than is a conspiracy to levy war under the levying provision. But he cites no direct authority for his assertion. The specially

Archbold 1076. His further comments suggest that he draws this conclusion from rulings on the effect of a conspiracy to levy war; for he declares that a conspiracy to adhere to enemies may probably be laid as an overt act, of compassing the king's death, and that

if the prosecution can prove such a conspiracy, [to adhere], and connect the prisoner with it by evidence, and can prove an act done by any one of the conspirators in furtherance of the common design, it may be given in evidence against the prisoner, if it tends to prove any of the overt acts laid in the indictment; for the act of one, in such a case, is the act of all; *2 R. v. Stone*, 25 St. Tr. 1115; 6 T. R. 527 \* \* \*

"A conspiracy to aid or comfort the king's enemies is not within the act," according to *A Treatise upon the Law and Proceedings in Cases of High Treason*, *op. cit. supra*, note 73, p. \*41. This work cites 3 Inst. 9, and 6 Ba. Abr. 5th ed. 516, the latter in turn relying on Coke, Hale, Pleas of the Crown 13, 14 (the one volume work preceding the History), and 1 Hawkins P. C. c. 17, sec. 27 for the same proposition. Coke, Hale, and Hawkins, however, discuss only conspiracy to levy war, in the passages relied on; and in no others do they appear to support the doctrine for which they are here cited.

3 Holdsworth 288 points out a probable historical explanation for the omission of conspiracy to levy war as a branch of treason under the Statute of Edward III:

As is well known, there is no mention in the statute of a conspiracy to levy war; and, as Maitland points out, [2 Pollock and Maitland 503, 504; but this refer-



broad scope of the crime of compassing is stressed to some extent in East's development of Foster's argument that under that heading it is not neces-

ence actually discusses only the reason for the late recognition of the crime of levying war against the king, this is probably due to the fact that such a conspiracy was hardly regarded as an offence if the war was properly declared.

That is, the feudal bond was in law a reciprocal one, of rights and duties, so that the vassal had a right in some cases to war upon a lord who had broken the bond. Thus, the omission of conspiracy in the statutory definition would not in its origin reflect any policy relevant to present use of the Statute. Cf. 2 Hallam, Constitutional History of England (London, 1827) 501.

2 Chitty 69, 73 gives as a sufficient count for adhering to enemies the following allegations, which might be deemed broad enough to include a meeting with an enemy agent as a sufficient overt act of adherence:

And further, &c. \* \* \* He the said William Stone, as such false traitor as aforesaid, during the said war, to wit, on, &c. and on divers other days as well before as after that day, at, &c. aforesaid, well knowing the said William Jackson traitorously to have come to and landed in this kingdom, for the traitorous purpose of procuring and obtaining intelligence and information whether the subjects of our said lord the king were or were not well affected to our said lord the king and his government, and were or were not likely to join with and assist the forces of the said persons exercising the powers of government in France, and being enemies of our said lord the king as aforesaid, in case an hostile invasion of this kingdom should be made by them for the prosecution of the said war against our said lord the king, and of sending and causing to be sent such intelligence and information to the said persons exercising the powers of government in France, and being enemies of our

sary to postpone the trial of an aider and abetter until the conviction of the principal actors, since advising the king's death is itself the main offense.<sup>10</sup> It is only from such unsatisfactory scraps that one can weave any theory of these writers on the nature of the overt act element, however.

---

said lord the king, as aforesaid, for the aid, assistance, direction, and instruction of the said enemies of our said lord the king, in their conduct and prosecution of the said war against our said lord the king, did, with force and arms, maliciously and traitorously receive and treat with the said William Jackson, at, &c. aforesaid, for the aid, assistance, and direction of the said William Jackson, in the prosecution, performance, and execution of his traitorous purpose aforesaid, and did then and there maliciously and traitorously aid, comfort, abet, and assist the said William Jackson in, about, and concerning the prosecution, performance and execution of his the said William Jackson's traitorous purpose aforesaid.

<sup>10</sup> East 100; *cf. id.*, 58. However, the argument that compassing was always a peculiarly broad offense due to ideas no longer prevailing, regarding the special protection of the King's person, is somewhat rebutted by the emphasis which is put on concern for the King, not as a person, but as symbol of the ordered community. See Foster, note 56, *supra*. This also appears in the distinction taken by Hale and East between the scope of the crime as applied to the king and to his queen or heir apparent. 1 East 65 thus says, of the crime of compassing the death of the queen or of the eldest son and heir:

As to what shall be said to be an overt act of compassing their death: it must be such as shews an unlawful intent against their *persons*, and not merely against their *state and dignity*. Therefore much of what has been already said concerning overt acts of compassing the death of the king, which are specifi-

It is probably significant of a felt connection with fundamental policies in the conduct of politics that most of the post-18th century writers on

cally appropriate to him and his sovereign power and royal dignity, does not apply to the queen or prince. Thus a compassing to imprison or otherwise punish them by due course of law is not within the statute; but a compassing to wound them is.

See 1 Hale 127-128.

\* This paragraph is based on examination of the following works, among others. Only those containing some substantial discussion of the subject are noted.

Anson, *The Law and Custom of the Constitution* (3d ed. 3 vol. Oxford, 1907).

Chalmers and Asquith, *Outlines of Constitutional Law* (5th ed. London, 1936).

Hallam, *The Constitutional History of England* (2 vol. London, 1827).

Jolliffe, *Constitutional History of Medieval England from the English Settlement to 1485* (London, 1937).

Keir, *Constitutional History of Modern Britain 1485-1937* (2d ed. London, 1943).

May, *Constitutional History of England* (3 vol. London, 1912).

Morris, *Constitutional History of England to 1216* (N. Y., 1930).

Smith, *History of the English Parliament* (2 vol. London, 1892).

Stubbs, *Constitutional History of England* (3 vol. 6th ed. Oxford, 1897).

Tanner, *Tudor Constitutional Documents A. D. 1485-1603* (Cambridge 1930).

Taswell-Langmead, *English Constitutional History* (9th ed. London, 1929).

Thomson, *A Constitutional History of England* (4 vol. London, 1938).

the English constitution bring the law of treason into their discussions. The majority of these commentators are laymen, and in all of these works the treatment of the elements of the crime merely derives from authorities already examined, and casts little additional light thereon. But, it is worth noting, as evidence of a prevailing climate of opinion, that these books firmly entrench the notion of the Statute of Edward III as a desirable delimitation of a dangerously vague field,<sup>81</sup> and that with striking uniformity they emphasize the danger of abuse of broad categories of "treason" in the arena of domestic politics.<sup>82</sup> As a concrete expression of this general attitude, there appears a general, if ill-defined, condemnation of "constructive" treasons; and it is especially interesting to see that *Lord Preston's Case*, in its rulings on the sufficiency of the overt acts, is cited as the extreme point of extension of construction—representing "the fictitious interpretation of the crime of compassing."<sup>83</sup> Hallam alone, however, expressly insists on linking the overt act to the showing of intent.<sup>84</sup>

<sup>81</sup> 2 Anson 243; 2 Hallam 499; Jolliffe, 446-447; 1 Smith 211; Taswell-Langmead, 242, n.

<sup>82</sup> Jolliffe, 446; Keir, 107, 213; 2 May 45, 55, 72 (though, cf. *id.*, 43); 2 Smith 340; 3 Stubbs 290, 537; Tanner, 379; Taswell-Langmead, 348.

<sup>83</sup> Tanner, 377, note 2; cf. 4 Thomson 284.

<sup>84</sup> See 2 Hallam 516.

In the vast mass of circumstantial testimony which our modern trials for high treason display, it is sometimes difficult to discern, whether this great principle of our law, requiring two witnesses to overt acts, has

## 2. STATUTORY EVIDENCE OF ENGLISH POLICY REGARDING TREASON

In a very general sense, the statutory history of the law of treason in England may be said to evidence a strong, long-run policy restrictive of the scope of that offense. With reference to the extent of the three branches of treason which have been of the greatest continuing importance—compassing the king's death, levying war against him, and adhering to his enemies—the policy evidenced in the legislative history is less clearcut.

Edward III, Statute 5, Chapter 2 (1350) represented a very definite decision to limit the area of crimes to be called "treason". Comparison of the act with the earlier common law, and with the Parliamentary petition which gave rise to it, makes this plain; and the fact that the motive may have been to limit the occasions on which land would forfeit directly and irrevocably to the

---

been adhered to; for certainly it is not adhered to, unless such witnesses depose to acts of the prisoner, from which an inference of his guilt is immediately deducible.

Cf. 1 *id.* 177, n. In the light of the quoted comment, and as evidence of the inherent ambiguity of those statements, which assert that the act must "manifest" treason, it is interesting to note that elsewhere Hallam says that

The crime of compassing and imagining the king's death must be manifested by some overt act; that is, there must be something done in execution of a traitorous purpose.

2 *id.* 505. In this latter statement, clearly the meaning is that the act must "manifest" the intent in the sense of translating thought into deed.

king, rather than to protect freedom of political processes, or the liberty of the subject, does not alter the restrictive character of the statute.<sup>83</sup> Moreover, during the creative years when the law of treason was under appraisal with reference to its political implications, the restrictive character of the Statute of Edward III was treated as a matter of political policy, and it is in that light that the words of the Statute became part of the politico-legal inheritance of the American colonies.<sup>84</sup> Following the periods of greatest excess in domestic political controversy, in which both legislative and judicial extensions of the concept of "treason" were carried to points ever thereafter criticized, there was an invariable return in the period of calm to the Statute of Edward, treated as the expression of a sound political

<sup>83</sup> On the common law, see 2 Stephen 243-247; 2 Pollock and Maitland 506-508; 3 Holdsworth 287-291. On the economic motive for the passage of the Statute, see Luder, 10-11; 2 Stephen 247; 2 Pollock and Maitland 508; 2 Holdsworth 449. That the Statute is a limiting act, see, in the discussion of English treatises, notes 5, 6, 30, 48, 62, 79. The Statute furnishes its own evidence of the generally restrictive intent behind it, in its express exclusion from the scope of treason of certain types of cases which had been dealt with as treasonable at common law, in its explicit reservation of the lord's right of escheat in petit treason, and in the stipulation that the judges must hereafter leave novel cases to the judgment of Parliament, or at least of the House of Lords. See 3 Holdsworth.

<sup>84</sup> See passages cited, in the discussion of English treatises, from Coke (notes 5, 6), Hale (notes 30, 31), and Foster (note 48). *D*



limitation.<sup>87</sup> Thus today, except for the statutes of 1 and 6 Anne protecting the succession as established by the Revolution of 1688, the Statute of Edward III defines the only types of "treason" recognized by English law.<sup>88</sup>

<sup>87</sup> 2 Stephen 251; 3 Holdsworth 287. Stephen takes a sceptical view of the reality of the restrictive policy evidenced in the Statute:

In quiet times it is seldom put in force, and if by any accident it is necessary to apply it, the necessity for doing so is obvious. For revolutionary periods it is obviously and always insufficient, and at such times it is usually supplemented by enactments which ought to be regarded in the light of war measures, but which are usually represented by those against whom they are directed as monstrous invasions of liberty. The struggle being over, the statute of 25 Edw. 3 is re-instated as the sole definition of treason, and in this way it has become the subject of a sort of superstitious reverence.

<sup>88</sup> See Archbold, 1056-1065. As is hereafter noted in the text, the only substantive changes which have continued are in further definition of the classic categories of the crime. Other statutory changes are procedural. Compare the proposal of the Criminal Code Commission, quoted in 2 Stephen 283.

The Treachery Act, 1940 (see Hailsham's Laws of England, Supplement 1943, paragraph 431), does not appear to modify the proposition stated in the text. In terms an emergency enactment, to expire when an Order in Council shall declare the emergency ended, this statute is almost entirely concerned with relieving the prosecution of the procedural restrictions of previous treason legislation and with tightening the penalty. It affects the scope of the crime, so far as the element of betrayal of allegiance is concerned, by extending its penalty to alien enemies. The conduct prohibited seems to amount only to such as would

Little guidance towards sound policy in the definition of "treason" and the overt act element in the offense is to be found in the legislation which went beyond the terms of the Statute of Edward. It is a fact that the overt act element was dispensed with in several statutes which declared it treason merely to hold certain opinions or beliefs, against the rightful title of the king to his authority, or in favor of the powers asserted by the pope, or to refuse to take a test oath.<sup>89</sup> It is likewise a fact that in troubled times statutes resolved the border line questions of spoken or written words as sufficient overt acts, by declaring treasonable the speaking or writing of similar opinions as well as of certain types of persuasion to action.<sup>90</sup> But this legislation has been regarded as extensions of the crime beyond the limits of the Statute of Edward and not as parliamentary

plainly be covered by the charge of adherence to enemies, except as the scope of the crime may be affected by the provision penalizing the doing or attempting of any act "which is designed or likely to give assistance to the naval, military, or air operations of the enemy \* \* \*"

[Italics added.] The precise effect of this last stipulation is not clear. Certainly, it would not be construed to eliminate *mens rea*, since the Act begins by requiring a showing of intent to aid the enemy; on the other hand, it may serve to prevent a defense argument that a slim chance of success argues lack of real intent. Whatever its implications for the intent element, this phrase implies also a conception of an overt act as one tending to translate idea into execution. See Davies, *The Treachery Act*, 1940, (1941) 4 *Modern Law Rev.* 217; (1940) 4 *Jour. Crim. Law* 304; (1940) 404 *Just. P.* 342; cf. (1941) 105 *id.* 178.

<sup>89</sup> See statutes discussed in 4 Holdsworth 493-496.

<sup>90</sup> *Ibid.*

interpretations of its terms.<sup>91</sup> Moreover, the extensive legislation not only lacks relevance as an interpretation of the classic definition of treason, but also as a guide to its underlying policy. For this crisis legislation on its face expresses the broadest, drag-net policy of preventive and protective solicitude for the Crown; and in no respect is this more obvious than in the elimination or minimizing of the overt act element in the crime. Likewise, on its face, this legislation expresses policy determined in the light of very specific problems of a questioned succession and the challenge of papal authority. In contrast, the Statute of Edward was in origin a restrictive act, and it has entered the English Constitution with the gloss of centuries of political thought, as a guaranty of free political processes. Its terms have the breadth of constitutional provisions, and have been in fact regarded as an expression of principle and not as *ad hoc* reactions to the threat of Pope or Pretender. So far as its particulars are concerned, commentators from Coke on have treated as a basic characteristic of the Statute its emphasis on the overt act as a distinct element of the offense, and legislation which frankly departs from this emphasis can only be regarded as springing from a wholly different view of policy.

One type of legislation extending the usual limits of the Statute of Edward is enough on the border line between the familiar and the alien to deserve note, however. The Act of 3 William and Mary, Chapter XIII ("An Act against cor-

<sup>91</sup> 2 Stephen 263, 265; 4 Holdsworth 493; cf. 1 Hale 261.

responding with Their Majesties Enemies"), provided:

For preventing of the Traiterous Correspondence and Commerce with the French King or his Subjects and supplying them with Warlike or other Stores or Commodities by means of which they may be any way aided or comforted in carrying on their War against Their Majesties Be it declared and enacted \* \* \* That if during the present War between Their Majesties and the French King any person or persons shall send or load or transport or deliver or cause to be sent or loaden or transported or delivered unto or for the Use of the said French King or any of his Subjects residing within his Dominions or any Towne or Territory in his possession or into or for any Port or Place within his said Dominions any Arms Ordnance Powder Bullets Pitch Tarr Hemp Masts Cordage Iron Coales Lead or Salt-Peter that every person or persons so as aforesaid offending being legally thereof convicted or attained by due course of Law shall be deemed declared and adjudged to be a Traytor or Traytors and shall suffer Pains of Death and alsoe lose and forfeit as in cases of High Treason.

\* \* \* if any of their Majesties Subjects shall from and after the Tenth day of March in the yeare of our Lord One thousand six hundred ninety one without license from Their Majesties voluntarily goe or repaire or imbarque in any Vessel with an intent to go into France or any Dominions of the French [King] and be upon full proof convicted thereof he shall be taken deemed

and adjudged to be guilty of High Treason and shall suffer such Penalties as in case of High Treason.

\* \* \* if any person or persons being Their Majesties Subjects shall after the Five and twentieth day of March in the year of our Lord One thousand six hundred ninety-two voluntarily come or returne from France or any of the French Kings Dominions in Europe into England or any of Their Majesties Dominions in Europe during the said War without Their Majesties leave for that purpose first had and obtained and be thereof convicted by due course of Law shall be committed to Prison and there closely kept without Bail or Mainprize during Their Majesties pleasure for any time not exceeding Twelve Months.

This was in 1691. In 1697-1698, 9 William III, Chapter I ("An Act against corresponding with the late King James and his Adherents") made a similar provision against a danger foreseen as likely to arise after the end of the French war:

Whereas upon the Conclusion of Peace betweene His Majesty and the French King it is become necessary for the carrying on a Trade and Commerce betweene England and France That the Subjects of each Kingdome should have the freedome of [going & coming] out of and into the said Kingdomes respectively And whereas such Persons who have been in Armes against His Majesty or have been engaged in traitterous Conspiracies against His sacred Person and Government and other disaffected Persons may take Advantage and be encouraged from thence to forme and carry on Treasonable Designes and Practices against his Majes-

ties Royal Person and Government unlesse some Provision be made for Prevention thereof Be it therefore enacted. . . . That if any of His Majesties Subjects who have att any time since the Eleventh Day of December One thousand six hundred eighty eight voluntarily gone into France or any of the French Kings Dominions in Europe without License from His Majesty or Her late deceased Majesty Queen Mary of blessed Memory or who have att any time durning the late Warr with France borne Arms in the Service of the French King either by Sea or Land or who have att any time since the Thirteenth day of February One thousand six hundred eighty eight been in Arms under the Comand or in the Service of the late King James in Europe shall att any time after the Fourteenth Day of January One thousand six hundred ninety seven returne into this Kingdome of England or any other His Majesties Dominions without License from His Majestie under the Privy Seale every Person so offending shall (being lawfully convicted thereof) be taken deemed and adjudged to be guilty of High Treason and shall suffer and forfeit as in Cases of High Treason.

And for preventing trayterous Correspondence between his Majesties Subjects and the late King James or his Adherents Be it further enacted \* \* \* That if any of his Majesties Subjects from and after the said Fourteenth Day of January One thousand six hundred ninety seven without Licence from His Majesty shall within this Realme or without in order to give any Aid or Assistance to the said late King James hold entertaine or keep any Intelligence or Correspondence by Letters Mes-



sages or otherwise with the said late King James or with any Persons imployed by him knowing such Person to be so imployed or shall without Licence from His Majesty by Bill of Exchange or otherwise remitt or pay any Sum or Sums of Money for the Use or Service of the late King James knowing such Money to be for such Use or Service such Person so offending being lawfully convicted shall be taken deemed and adjudged to be guilty of High Treason and shall suffer and forfeit as in Cases of High Treason.

After the recognition by Louis XIV of the title of the son of James II, the act of 13 & 14 William III, Chapter III (1701) further provided that

\* \* \* for preventing traiterous Correspondence between your Majesties Subjects and the said pretended Prince of Wales or his Adherents Be it further enacted \* \* \* That if any of the Subjects of the Crown of England from and after the First Day of March One thousand seven hundred and one shall within this Realm or without hold entertain or keep any Intelligence or Correspondence in Person or by Letters Messages or otherwise with the said pretended Prince of Wales or with any Person or Persons imployed by him knowing such Person to be so imployed or shall by Bill of Exchange or otherwise remitt or pay any Sum or Sums of Money for the Use or Service of the said pretended Prince of Wales knowing such Money to be for such Use or Service such Person so offending being lawfully convicted shall be taken deemed and adjudged to be guilty of High Treason and shall

suffer and forfeit as in Cases of High Treason.

During the same period, similar legislation was passed as other alarms moved Parliament to action.<sup>92</sup>

Since the conduct punished in the first paragraph of the act of 3 William and Mary (supplying stores of war to the enemy) would seem clearly within the Statute of Edward III, there is some reason to regard this statute as a whole as declaratory of the offense of adherence as applied to the contemporary circumstances, rather than as intended to expand the scope of that offense. The statutes aimed at correspondence with James II and the Pretender seem intended to strike down conspiracy to levy war. Viewed with reference to that branch of the Statute of Edward, they constitute an extension. But by the time of their enactment, conspiracy to levy war was established in the decisions as a sufficient overt act of compassing the king's death; and in this light, the acts of 9 and 13 & 14 William III may reasonably be viewed as declaratory of the offense of compassing, as applied to a contemporary danger. If these statutes may be taken as parliamentary interpretations of the crimes of compassing the king's death and adhering to his enemies, they reflect a broad concept as to the type of overt act which may suffice to make out

<sup>92</sup> See 2 Stephen 262; 6 Holdsworth 399. See 7 Anne c. 4, sec. xlviii, for a provision penalizing traitorous correspondence by members of the armed forces, obviously the source of the similar provision common in early American militia laws.

those charges. The acts have in common, that they declare treasonable certain overt acts of contact with a foreign or domestic foe, without requiring the showing of a specific intent to betray. Further, in the act of 3 William and Mary, the second quoted paragraph makes it high treason merely to travel or take ship with the intention to go to a country then at war with England, with no requirement of a showing that these acts—certainly as “harmless” on their face as a dinner meeting with a known enemy agent—were done with a specific purpose of adhering to the enemy. The act against adherents of James II creates a treasonable offense based on the simple fact of departure to France after the Revolution of 1688. That legislation made correspondence treasonable only when shown to have been “in order to give any Aid or Assistance to the said late King James”; but the act of 1701 dispensed with this intimation of a specific intent as a necessary element of the offense and held treasonable the mere correspondence with the Pretender, though it apparently does require a showing of specific intent if the charge is the sending of funds. It is interesting to note the weight put in these statutes upon the guilty implications of the fact that the person charged dealt with an agent of the foe, “knowing such Person to be so employed.”

So much for legislation going beyond, or, as in these last cases, perhaps defining the borderland of “treason” as defined in the Statute of Edward III. When one asks what fundamental policy seems reflected in the legislative history of the

three classic branches of treason—compassing the king's death, or adhering to his enemies, or levying war upon him—the answer looks both ways. There has been no statutory tampering with the last two; but the first has been extended. Holdsworth tells the story succinctly:

In 1795 [36 George III. c. 7 s 1; made perpetual by 57 George III, c. 6 § 1] a statute was passed which, in effect, gave statutory force to the constructions which had been put upon the clause of Edward III.'s statute relating to the compassing of the king's death. It provided that it should be treason to compass: (i) not only the death but also the bodily harm, imprisonment, or restraint of the person of the king, or his deposition; (ii) the levying of war on him either in order to compel him to change his policy, or in order to overawe both or either of the houses of Parliament; (iii) the stirring up of any foreigner to invade any part of the king's dominions; such compassing being evidenced by printing, writing or other overt act. In 1848 [11, 12 Victoria c. 12 § 1; the object of the Act was, by diminishing the penalty, to render it easier to prosecute these crimes with success, Kenny, Criminal Law 274] it was in effect enacted that, such of the treasons set out in the last cited Act as related to the compassing the death or bodily harm, the imprisonment or restraint of the person of the king, should be treason; and that the other compassings specified in the Act should be felony. But nothing in the Act was to affect the statute of Edward III. ['Provided always \* \* \* that nothing herein contained shall lessen the force of or in any manner affect anything enacted by the stat-

ute passed in the twenty-fifth year of king Edward III.]—That statute must of course be taken to bear the construction which the judges have put upon it; for there is nothing in this legislation to negative that construction. The result is that the acts made felony by the statute of 1848 could, if the crown wished, be treated as constructive treason by virtue of the Act of Edward III. As Professor Kenny justly says [Criminal Law 274], it is “a singular juridical anomaly that precisely the same action should thus occupy, simultaneously, two different grades in the sphere of crime.” This legislation did not touch the clause relating to the levying of war against the king. The result is that the constructive extension of this clause is in no way affected. \* \* \*

Nor, he might have added, does the later legislation in any way affect the clause relating to adherence to the king's enemies. However, there has not been occasion for any notable extension of that clause by construction heretofore. In any case, there is no evidence from which to argue that the statutory extension of the compassing provision carries any implication that the other provisions should be treated more restrictively than they have been before.

Indeed, the fact that the legislative extension of the crime of compassing the king's death has merely codified the gloss which the judges had put on the Statute of 1350, points to the paradoxical character of the policy underlying the definition of “treason”. The Statute of Edward III

<sup>1</sup> 8 Holdsworth 321-322; see 2 Stephen 279-281.

is the historic expression of a general policy restrictive of the scope of the offense. But over the centuries the judges have construed the basic terms of the Statute so as to extend the bounds of the crime considerably beyond the *prima facie* meaning of the words.<sup>5</sup> This has been true both of the crimes of compassing the king's death, and

---

<sup>5</sup> This contrast between the restrictive character of the Statute of Edward III, viewed in the light of the possible scope of "treasons" outside the limits of those defined therein, and the liberal construction given to the Statute and apparently acquiesced in by Parliament, is overlooked in the sweeping scepticism expressed by Tucker regarding the limiting character of the act:

There are no negative or restrictive words in the enacting clause of the statute of Edward the third; and the conduct of the judges in England seems to evince an opinion on their parts that the statute is not to be construed so strictly as the learned commentator seems in this place to suppose it ought. [Referring to Blackstone's assertion that the statute "defines what offences *only* for the future should be held to be treason."] Stanford said, expressly, on the trial of sir Nicholas Throgmorton, that there remained divers treasons at common law, at that day (1 Mar.) which were not expressed by that statute. 1 St. Tr. 72. And Bromley, chief justice, said the same thing, in effect. Ibid. 73.

5. Tucker, ed., Blackstone's Commentaries with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia (Philadelphia, 1803) 75, n. 2; cf. *id.* App., Note "B", pp. 16-17. In the quoted statement, Tucker ignores the fact that in the light of the history of its passage, the Statute, though lacking negative words, placed a clear negative on the previous scope of common law treasons; and the authorities cited by him are not repre-



of levying war against him; and there is no evidence that it has been less true of the provision

representative of the trend of authority. Cf. 4 Holdsworth 498, n. 1. In his "Note B. Concerning Treason" (vol. 5, pp. 16-17), Tucker expands upon the point he has previously made, in a fashion which, if not good English history, is interesting as a reflection of the restrictive emphasis with which "treason" was viewed in the early years of the Republic:

It seems to have been taken for granted, that the clause in our constitution, which relates to the crime of treason, is an exact transcript from the statute 25 Edw. III. It may therefore be not amiss to compare them. \* \* \* Upon this statute we may here remark, that there are no negative words in it, as in the constitution of the United States; and that, so far from declaring as that does, that treason shall consist, *only* in the cases enumerated, it expressly supposes that *many other* cases of treason may happen, although the framers of that statute could not then think of them. True it is, such cases were to be reserved for the king and parliament to pass upon, but the violence of succeeding times, and the corruption and complying temper of succeeding parliaments, during a succession of more than two centuries, left but little room for scrupulous judges, had there been any such in those days, to apply for a parliamentary interpretation of any undefined offence supposed to be treason.

Tucker in effect thus brings out the ambiguity which is to be noted as involved in Thomas Jefferson's use, for the purpose of effecting a restrictive policy, of statutory terms to which English judges had given broad constructions. But, as will be pointed out in the discussion of early American treason materials, the fact that this ambiguity lurks, unresolved, in the background, cannot erase the fact that in the eyes of the lawyers and draftsmen of that time the Statute of Edward III represented an instrument for limiting the scope of the offense.

punishing adherence to enemies for any reason except lack of occasion to apply that clause broadly. Parliament has never amended the Statute so as to curb the extended constructions of the judges. There is here a large degree of that irrational quality to be found in many of the legends which form a part of "public policy"; but, so far as the English Parliament is concerned, it is difficult, on this evidence, not to conclude that there has been general satisfaction with the scope of the "treasons" embraced within the three classic branches of the Statute. Compare the judgment reached by Stephen, after an exhaustive consideration of the history:

The general effect of the whole is that the statute which has been so much praised, is really a crude, clumsy performance, which has raised as many questions as it can have settled, and which has been successful only when it was not required to be put in force. It has been praised by one party because it does not, in terms, relate to treasonable conspiracies, and by another because they approved of the artificial constructions of which they said it was capable. The fact that it has been in force for 530 years seems to me to show only the extreme indifference of the public to the manner in which their laws are worded, and the attachment of the legal profession to phrases which have been long in use and to which an artificial meaning has been attached. If, however, we turn from the mode by which the present result has been arrived at, to the result itself, I do not think it can be said to be a bad one, except in so far as the levying of war has been interpreted to extend to great

riots for a political object. The Criminal Code Commission proposed to re-enact the existing law with a few unimportant exceptions \* \* \* 95

### 3. ENGLISH CASE LAW PRIOR TO 1790\*

Only 11 reported English cases antedating the adoption of the United States Constitution seem to have involved distinct charges of adherence to the king's enemies. One of these arose in 1554 during the reign of Mary, as the result of Wyatt's rebellion, and another in 1746 during the reign of George II, as the result of the Scotch uprising in aid of the Young Pretender. The others all arose out of war with France: one in 1691 during the reign of William and Mary; four in 1696 during the reign of William III; one in 1708 during the reign of Anne; one in 1758 during the reign of George II; and one in each of the years 1781 and 1782, during the reign of George III. These cases are here examined to ascertain the concepts employed by the English judges in dealing with the crime of adherence, especially in comparison with the doctrines developed in the English cases prior to 1787 under the heads of compassing the death of the king, and levying war upon him.

*Trial of Sir Nicholas Throckmorton*, 1 How. St. Tr. 869 (1 Mary, 1554.) Throckmorton was indicted under all three principal branches of the

<sup>95</sup> 2 Stephen 283.

\*The materials under this heading were collected and prepared in the first instance by attorneys on the staff of the Department of Justice, and revised and edited by Mr. Hurst. In the preparation of this section every reported English treason case of any conceivable consequence antedating 1790 was examined.

Statute of Edward III. Evidence was introduced at the trial to show that he had "incited" and "procured" the rebellion of Thomas Wyat, who had shortly before confessed his guilt in levying war against the queen, in circumstances which would today probably be regarded as amounting to civil war. [Arraignment of Thomas Wyat, 1 How. St. Tr. 861 (1 Mary, 1554)]. The charge to the jury seems merely to have summarized the evidence and to have put to them the naked issue, whether Throckmorton was "guilty of these Treasons, or any of them." (1 *id.* 897). The jury acquitted. Throckmorton was held to answer further charges, and the jury were heavily fined. (1 *id.* 899-902).

The colloquies during the trial may evidence acceptance of the idea that consultation with the enemy, or inciting him to action, might constitute adherence. (1 *id.* 891 *et seq.*). The authority of the case, as a definition of treason under the Statute of Edward III, is impaired, however, by the intimation of Lord Chief Justice Bromley, that the court may not, at this time, have regarded itself as limited to such doctrine as could be fitted within "the express words of the statute".<sup>96</sup>

<sup>96</sup> To Throckmorton's plea for sticking to the letter of the statute Lord Chief Justice Bromley replied (1 How. St. Tr. 891) —

Notwithstanding the principle, as you alledge it, and the preciseness of your sticking to the bare words of the Statute, it doth appear and remain of record in our learning, that divers cases have been adjudged Treason, without the express words of the statute, as the queen's learned counsel there can declare.

Moreover; the comments of the judges during the trial, and their action in fining the jury, evidence the fact that the court viewed the case with strong feeling and with an eye to the policy of curbing the public unrest over the Spanish alliance, which defendant had opposed.

*Trial of Sir Richard Grahme* ("Lord Preston's Case"), 12 *id.* 645 (2 Wm. & Mary, 1691). (See I Br., pp. 42-48). Lord Preston and two others were indicted on the charges of compassing and adherence, both laid in the county of Middlesex. It appeared at the separate trial of Lord Preston that he had taken a small boat at Surrey Stairs in the county of Middlesex; had boarded a ship in the county of Surrey; and had been discovered under the hatch of the ship by the arresting officers, while in the county of Kent, together with Ashton, who carried concealed in his clothing a sealed packet which the prosecution sought to prove to have contained documents setting forth a treasonable plan. (12 *id.* 729-732, 740). In a colloquy between Lord Chief Justice Holt and the prisoner, the former declared that taking boat in Middlesex, to board a ship in prosecution of an intention to carry the papers to France, constituted "an overt act in the county of Middlesex", and that whether the papers were the prisoner's, and whether he meant to go to France, were questions for the jury. (12 *id.* 726-727, 727-729; I Br., pp. 43-46). Lord Chief Justice Pollexfen and the Lord Chief Baron in substance supported

Holt's concept of the overt act." L. C. J. Holt charged the jury. He told them that Lord Preston stood indicted for high treason in imagining and compassing the death of the king and queen, and that he was charged in that connection with writing a plan for the invasion of England and "designing" to carry the plan to France. The Lord Chief Justice then observed (12 *id.* 730),

There is another treason in the indictment mentioned, and that is for adhering to, and abetting the king's enemies, there being open war declared between the king and queen, and the French king.

He made no further direct comment on the charge of adherence, however, but went on (12 *id.* 734) to

<sup>97</sup> Lord Chief Justice Pollexfen's statements are set forth at 1 Br., pp. 45-46 and 12 How. St. Tr. 728-729. The Lord Chief Baron said (12 How. St. Tr. 729-730) —

Your lordship makes a question: ~~as~~ the proof stands, whether here be any thing done within this country? Here are instructions given to the French king how to invade England, and carry on the war against us. These instructions are contained in several papers, and these papers in a packet are carried to the smack, which smack was hired to go to France. You are found taking water at Surrey stairs, which is in the county of Middlesex, in order to go to the smack: you did go to the smack; the papers were taken in your company, and were seen lying by your seals; and the witnesses swear, they believe some of them to be your hand; you took care to desire to have them disposed of. Now how far the jury will believe this matter of fact, that is thus testified, is left to them; this seems to be the proof, and if the jury do believe it, here is a plain evidence of an overt-act in the county of Middlesex.



sum up the evidence, which, if believed, he felt clearly showed treason:

Gentlemen, there is no manner of doubt but this is a treasonable declaration, and if any person had this in his possession, and was going into France to carry, with an intention there to make use of it, that is treason, though it be couched under specious pretences of restoring people to their liberty: it was plainly a design to invade England by a French army.

In concluding his charge, Holt again clearly sustained the sufficiency of ~~the overt act~~ charged in Middlesex (12 *id.* 740):

Ay, but gentlemen, give me leave to tell you, if you are satisfied upon this evidence that my lord was privy to this design, contained in these papers, and was going with them into France, there to excite an invasion of the kingdom, to depose the king and queen, and make use of the papers to that end, then every step he took in order to it, is high-treason, wherever he went; his taking water at Surrey stairs in the county of Middlesex, will be as much high-treason, as the going a ship-board in Surrey, or being found on ship-board in Kent, where the papers were taken.

The jury convicted Lord Preston, but the latter obtained a pardon less than ten days thereafter. (12 *id.* 745, 817). Ashton was next tried, under the same indictment; was convicted; and was executed. There is no record that the third person indicted was ever brought to trial. (12 *id.* 747). Ashton's case does not require separate statement, as its significance may be sufficiently seen in a discussion of Lord Preston's conviction.

The circumstances of this prosecution, like those of Throckmorton's, suggest that the breadth of doctrine laid down may have reflected something more than a purely professional development of the law. This case was tried in what was only the second year of the reign of William and Mary, with the long-vexing problem of the Pretender freshly created and pregnant with peril to the new government created by the Glorious Revolution. Lord Preston seems to have met with serious disfavor in the new regime.<sup>22</sup> The trial proceeded with marked expedition. The indictment was returned January 15, 1691; the trial began the morning of the next day; and on the 17th of January the selection of the jury was begun. The prisoner was denied counsel on the ground that even the technical question of the overt act laid in Middlesex did not constitute a question of law, but was a "matter of fact only" (12 *id.* 728). Although the report of the trial contains about 50,000 words, the trial was completed and the jury had returned its verdict in time for the court to adjourn until Monday, January 19. (12 *id.* 747). Some of the statements of the judges indicate definite hostility to the defendant, notably the declaration of Lord Chief Justice Pollexfen (12 *id.* 741), opening his address to the jury, that

Preston, reported elsewhere (27 How. St. Tr. 24) to have served as secretary of state to King James II, protested at his trial that he had intended to go to Flanders to secure rest and quiet, after having suffered the loss of his places in the revolution, and after having been twice imprisoned in the Tower and proclaimed a traitor throughout the country without having been indicted. (12 How. St. Tr. 743.)

I am fully of opinion there never was a more black nor horrible treason than is this plot that is now discovered; for I think Englishmen have no greater enemies than the French and the Papists.

It may be doubted whether this hostile atmosphere was overcome by the efforts of Lord Chief Justice Holt to introduce an element of greater moderation by his remarks, just before the jury retired (12 *id.* 744):

You are a stranger to most of us, and I am sure we do not desire your life; but still we must take care that justice be done to the government and the kingdom as well as to any particular person; and evidence that is given must have its due weight and consideration: If any one can design innocently to go into France, at this time of day, with such papers, and in such a manner, that I leave to the jury's consideration.

In view of the speed of the trial, and the "convicting" atmosphere surrounding it, it seems likely that the court and jury in substance paid little attention to technical difficulties regarding the pleading and proof of the overt act, and in effect treated the whole course of the prisoner's conduct as the overt act. At least, it is suggestive that in the later trial of Ashton (who, likewise denied counsel, seems to have been less capable of astute self-defense than Lord Preston), the issue of showing an overt act specifically in Middlesex was not raised, and the case was put to the jury by Lord Chief Justices Holt and Pollexfen on all the evidence. (12 *id.* 803 *et seq.*). Perhaps it was on this account that the charges to the jury in Ash-

ton's case embraced only the accusation of compassing. Cf. *Trial of Sir Henry Vane*, 6 How. St. Tr. 119, 123-129 (14 Charles II, 1662). But cf. *Trial of Captain Thomas Vaughn*, 13 How. St. Tr. 485, 535 (8 William III, 1696).

These circumstances apart, a question may be raised concerning the relevance of the overt act ruling in *Lord Preston's Case* to the definition of "treason" under the United States Constitution. For the judges in *Lord Preston's Case* seem to have had no intention of suggesting, or, any consciousness that there might be a need to suggest, a difference of scope between the charges of compassing and of adherence. The charge of compassing is clearly to the fore in the court's attention, and though it does not appear that the court would regard the adherence charge as involving any narrower doctrine under English law, there may be a question whether the latter charge should be read so broadly under the American definition, which excludes any branch of treason analogous to compassing the king's death.

Three cases tried five years after Lord Preston's case involved indictments for adhering to enemies as well as for compassing the king's death: *Trial of Sir John Freind*, 13 How. St. Tr. 1, 4, 11 (8 Wm. III, 1696); *Trial of Sir William Parkyns*, 13 *id.* 63, 67 (8 Wm. III, 1696); *Trial of Peter Cook*, 13 *id.* 311, 346 (8 Wm. III, 1696). France and England were then at war. In each case the government introduced evidence to show the defendant's complicity in a plot to have the French send forces to England, to establish James II as King of England. Lord Chief Justice Holt presided in the cases of *Freind*

and *Parkyns*; and in each he placed his charge solely on the allegation of compassing the king's death. Lord Chief Justice Treby presided in the *Cook* case, and charged the jury in terms which leave uncertain whether in his view a conspiracy is a sufficient overt act to make out the treason of adherence to enemies (13 *id.* 311, 386):

there are laid in the indictment two sorts of treason; the one is compassing and imagining the death of the king, the other is adhering to the king's enemies. The evidence to prove these treasons seems to be joint; for, as to that of compassing and imagining the king's death, as well as to the other, the overt acts are meeting and consulting about the treason, and then agreeing and resolving to invite and procure an invasion from France, and to meet that invasion with an insurrection here. And the evidence is applied equally to prove these acts.

Gentlemen, that these are proper overt-acts of compassing the king's death, I need not inform you, the law is very well known; and the prisoner's own counsel do acknowledge, that these are sufficient overt acts of compassing and imagining the king's death: so that all which they defend him by is, the improbability of the testimony given against him.

Since the judges thus chose to ignore the question whether a conspiracy which would suffice as an overt act of compassing would likewise serve to make out a charge of adherence, there seems some room for an inference that compassing and adhering doctrine may diverge, at least to the extent that conspiracy may not make out a charge of

adhering any more than of levying war.<sup>99</sup> Though this may suggest that the crimes of adherence to enemies and levying war are of narrower scope than that of compassing the death of the king, it also may indicate that the difference is not so much in the proof of treasonable intent, as in a requirement that in the first two an act must be shown which is closer to the point of execution of the intent than under a charge of compassing.

Analysis of the elements of "treason" is hammered out further in lengthy colloquies between court and counsel in *The Trial of Captain Vaughn*, 13 How. St. Tr. 485 (8 Wm. III, 1696), held about six months after the trials of Freind, Parkyns, and Cook. Captain Vaughn was charged with levying war and adhering to the king's enemies; but, as Lord Chief Justice Holt observed, "the adhering to the king's enemies is principally insisted on."<sup>100</sup> In substance, the overt act of adherence charged was that of cruising in a small ship of war, in English waters, in the service of France, with intent to take the king's ships while France and England were at war. The effort of the Crown to introduce evidence of an overt act different from that set out in the indictment provoked a discussion which yields some clarification of analysis of the nature of the overt act required under the three major branches of the crime. Interpreting the recent statute forbidding the showing of any overt act as such other than that laid

<sup>99</sup> Lord Chief Justice Holt distinctly ruled in the *Freind* case itself that a conspiracy to levy war would not constitute the treason of levying war. See footnote 126, *infra*.

<sup>100</sup> 13 How. St. Tr. 532.



in the indictment (7 Wm. III, c. 3, VIII), the court seems at first inclined to believe that the levying of war or adhering to enemies were charges intrinsically so definite in outline that no further specification need be made in the indictment; and that, the general charge of levying or adhering having been made, any particular act amounting to levying or adhering could then be shown. The charge of compassing, on the other hand, was seen as involving "not an overt act in itself, but \* \* \* a secret imagination in the mind",<sup>101</sup> and that hence the mere charge of compassing would not sufficiently indicate the gravamen of so broad and hidden an accusation, so that a particular overt act must be specified, and the proof must then, under the statute, conform to that specification. If this was in fact the court's first inclination, further argument altered it, and the court ruled that the indictment must spell out the particular act of adherence relied on by the prosecution, and that the proof must conform to the particular charge so laid.<sup>102</sup> Though the analysis is not wholly clear, it seems apparent that the judges were brought to see that "adhering" to an enemy was not in its nature a single act of cleareut character, but more likely a general enterprise, likely to have many particular acts as components. Thus at one point, Lord Chief Justice Holt pointed out that no further specification of an overt act than an accusation in the very terms of the Statute of Edward III could well be required where the charge was the killing of the

<sup>101</sup> 13 How. St. Tr. 496.

<sup>102</sup> 13 How. St. Tr. 499-500.

chancellor or treasurer.<sup>103</sup> In contrast, he subsequently stated the defense contention, with which he finally agreed, to be that

\* \* \* it is necessary to alledge in what manner he levied war, or adhered to the king's enemies; as that he appeared in such a warlike manner, or did adhere to and assist the king's enemies, by joining forces with them, or otherwise assisting them, or confederating with them; that, must be specified.<sup>104</sup>

So also this underlying rationale is reflected in the comment of Lord Chief Justice Treby, that although

\* \* \* the overt act or acts, in this case, [adhering] ought to be the particular actions, means, or manner by which the aid and comfort was given.<sup>105</sup>

this could not be required of the charge of treason by violating the queen:

And yet it is hardly possible to set forth any overt act concerning the second [head of treason under Statute Edward III], otherwise than the words of the statute, that article expressing so particular a fact.<sup>106</sup>

Some of the court's remarks in the course of discussion involve the familiar, and inherently ambiguous, references to an overt act in compassing as necessary to "manifest" the "secret thought and internal purpose"<sup>107</sup> which is the essence of

<sup>103</sup> 13 How. St. Tr. 496.

<sup>104</sup> 13 How. St. Tr. 496-497.

<sup>105</sup> 13 How. St. Tr. 498.

<sup>106</sup> 13 How. St. Tr. 498.

<sup>107</sup> 13 How. St. Tr. 497-498.

that charge. And when Lord Chief Justice Treby contrasts the other two main branches of the crime, noting that in them "the treason consists in visible or discernible facts, as levying war, &c.",<sup>108</sup> it may seem that he implies that an act of levying war or adhering to enemies will, *ipso facto*, be such as "manifests" the treasonable purpose. But the underlying note remains the realization that all of the major heads of treason involve broad purposes, which may be pursued in many ways; and the fair inference from this appraisal is that one may in fact engage in conduct of varied types in the furtherance of such a purpose, and that the act will hence not necessarily be of such a clearcut character that the policy of the statutory rule for indictments can be satisfied by a charge simply in the terms of the act of Edward III.<sup>109</sup>

Not only does *Vaughn's* case thus imply recognition that acts of ambiguous or indifferent character may amount to overt acts of treason, but in plainer fashion it indicates the judges' belief that an actual giving of aid and comfort is not required to make out a charge of adherence. Defense counsel objected to the sufficiency of the indictment:

\* \* \* for it is said only he went a-dun-  
ing; whereas they ought to have alleged

<sup>108</sup> 13 How. St. Tr. 497-498.

<sup>109</sup> In the *Trial of Daniel Danmarea*, 15 How. St. Tr. 521, 546, note, "it was resolved by all the judges, upon conference, that the indictment was good, and that levying war being an overt act of itself, no other overt act need be alleged. They agreed, however, that it ought to appear sufficiently upon the indictment that a war was levied, and that they appeared in such warlike manner; and that an indictment generally that A. levied war is not good."

that he did commit some acts of hostility, and attempted to take some of the king's ships; for cruising alone cannot be an overt-act; for he might be cruising to secure the French merchant-ships from being taken, or for many other purposes, which will not be an overt-act of treason.<sup>110</sup>

Lord Chief Justice Holt replied—

I beg your pardon. Suppose the French king, with forces, should come to Dunkirk with a design to invade England; if any one should send him victuals, or give him intelligence, or by any other way contribute to their assistance, it would be high-treason in adhering to the king's enemies.

Mr. Phipps answered that "here is nothing mentioned but cruising." Lord Chief Justice Holt tersely replied—

Cruising about the coasts of England with a design to destroy the king's ships.<sup>111</sup>

And he expounded further the preventive policy which he evidently felt to be the sound basis of doctrine here:

When men form themselves into a body, and march rank and file with weapons offensive and defensive, this is levying of war with open force, if the design be public. Do you think when a ship is armed with guns, &c. doth appear on the coast, watching an opportunity to burn the king's ships in the harbour; and their design be known, and one goes to them, and aids and assists them, that this is not an adhering to the king's enemies?<sup>112</sup>

<sup>110</sup> 13 How. St. Tr. 531.

<sup>111</sup> 13 How. St. Tr. 532.

<sup>112</sup> 13 How. St. Tr. 532.

Lord Chief Justice Treby spells out the doctrine in greater detail:

The indictment is laid for adhering to, and comforting and aiding the king's enemies. You would take that to be capable to be construed adhering to the king's enemies in other respects; but I take it to be a reasonable construction of the indictment, to be adhering to the king's enemies in their enmity. What is the duty of every subject? It is to fight with, subdue, and weaken the king's enemies: and contrary to this, if he confederate with, and strengthen the king's enemies, he expressly contradicts this duty of his allegiance, and is guilty of this treason of adhering to them. But then you say here is no aiding unless there were something done, some act of hostility. Now here is going aboard with an intention to do such acts; and is not that comforting and aiding? Certainly it is. Is not the French king comforted and aided, when he has got so many English subjects to go a cruising upon our ships? Suppose they man his whole fleet, or a considerable part of it; is not that aiding? If they go and enter themselves into a regiment, list themselves and march, though they do not come to a battle, this is helping and encouraging; such things give the enemy heart and courage to go on with the war; or else it may be, the French king would come to good terms of peace. It is certainly aiding and comforting of them to go and accept a commission, and enter into their ships of war, and list themselves, and go out in order to destroy their fellow subjects, and ruin the king's ships; these are actings of an hostile nature. And if this be not adhering, &c. it may as well be said, that if the same persons had made an attack

upon our ships, and miscarried in it, that had not been so neither; because that in an unprosperous attempt there is nothing done that gives aid or comfort to the enemy. And after this kind of reasoning they will not be guilty, till they have success; and if they have success enough, it will be too late to question them.<sup>113</sup>

Lord Chief Justice Treby's analysis clarifies the problem in several basic respects. His last comment points to the fact that "treason" must be viewed as a crime inherently of the nature of an attempt, because the threat underlying a treasonable intent is the most fundamental that can be raised; to rule that only accomplished aid and comfort will sustain the charge is to risk stultifying one's self, for if aid and comfort is accomplished, there may no longer be a sovereign to prosecute the offense against the allegiance owed him. His ready rejection of the notion "that in an unprosperous attempt there is nothing done that gives aid or comfort to the enemy" suggests an understanding that warfare is largely a matter of chance, as well as of the ultimate accounting of many factors of accretion on one side and attrition on the other. Thus, although any particular effort may fail, the very contribution of effort increases to that extent the enemy's chances of success, and aid and comfort is thus given. This implication is linked, also, with the recognition that aid and comfort need not be merely material, but may consist to a significant degree in giving heart to the enemy and bolstering morale by the encouragement given by the tender of help.

<sup>113</sup> 13 How. St. Tr. 532-533.



The next case in this line is that of *William Gregg*, 14 How. St. Tr. 1371 (6 Anne, 1708). Gregg pleaded guilty to an indictment for compassing and adhering after being apprehended as the result of the discovery by the postmaster at Brussels of a correspondence between the office where Gregg worked and the French, with whom the English were at war. According to the report of Judge Foster (14 How. St. Tr. 1376), the sending of letters of intelligence to the enemy was resolved by all the judges to be an overt act of both adhering and compassing. See also, 19 How. St. Tr. 1344. Here again, we have a decision to the effect that action taken to increase the chances of the enemy constitutes an overt act of adhering to the enemy, giving them aid and comfort, although it actually was prevented from being successful for its particular purpose.

The *Trial of James Bradshaw*, 18 How. St. Tr. 415 (20 Geo. II, 1746), involved charges of compassing, levying, and adherence growing out of the defendant's participation in the Scottish uprising designed to install the Young Pretender as king of England. Although the participants were called rebels, their activity seems to have amounted to war. The report of the case is scanty and contains neither discussion of the adherence charge nor the instructions by the court to the jury.

The indictment in the *Trial of Dr. Hensey*, 19 How. St. Tr. 1341 (32 Geo. II, 1758) was for compassing and adhering. Hensey was charged with committing treason in Middlesex by sending letters of intelligence to be delivered beyond the seas to the French, then at war with the English. (14 How. St. Tr. 1376-1377, footnote). It was

proven by persons who knew Hensey's handwriting that intercepted letters had been written by him. One of the letters was dated at Twickenham, which was in Middlesex. The defendant contended that no one act was proved against him in Middlesex, and that the evidence, even if it "had been brought home \* \* \* so as to affect him, yet by no means would have amounted to a proof of any overt-acts of either of the two before named species of treason" (19 How. St. Tr. 1343).

According to the report which Howell takes as authoritative, Lord Mansfield charged the jury that (19 How. St. Tr. 1344)—

As to the law—levying war is an overt-act of compassing the death of the king; an overt-act of the intention of levying war, or of bringing war upon the kingdom, is settled to be an overt-act of compassing the king's death. Soliciting a foreign prince, even in amity with this crown, to invade the realm, is such an overt-act; and so was cardinal Pool's case. And one of these letters is such a solicitation of a foreign prince to invade the realm.

Letters of advice and correspondence, and intelligence to the enemy, to enable them to annoy us or defend ourselves, written and sent, in order to be delivered to the enemy, are, though intercepted, overt-acts of both these species of treason that have been mentioned. And this was determined by all the judges of England, in Gregg's case: where the indictment (which I have seen) is much like the present indictment. The only doubt, there, arose from the letters of intelligence being intercepted

and never delivered: but they held "that that circumstance did not alter the case."<sup>114</sup>

The significance of the case, as with *Lord Preston's* case, may, however, be cast somewhat into question, by the fact that after being convicted the defendant received a pardon. (19 How. St. Tr. 1382.)

The last cases antedating the adoption of the Constitution known to involve charges of adherence to the enemy are the *Trial of Francis De la*

<sup>114</sup> From another report of the trial, considered by the reporter in Howell's State Reports "to be very inaccurate" (19 How. St. Tr. 1348, footnote), but nevertheless set out by him, it appears that Mansfield said in his charge to the jury (19 How. St. Tr. 1373-1374)—

That which constitutes an overt act in the eye of the law, is the accomplishment of the end proposed by the party acting to the best and utmost of his power. If a man endeavors to do an act of treason, and that act of treason fails through some intervening accident or occurrence, the party so endeavoring and acting to the best of his ability and power is deemed to be guilty of an overt act, as though he had done the thing he had proposed and intended. Thus, in cases of murder as well as treason, suppose a man firing off a gun, or a pistol, with a premeditated design to kill another, and by some accident or event, either the gun or pistol do not go off, or the party shot at evades the blow, the party shooting is guilty of an overt act, and is liable to be indicted as guilty of a capital offense.

As to my own part, the letters under consideration appear to me, to be absolute overt-acts, as real overt-acts as can possibly be: but whether the jury shall think so, is to be left to their consideration, who are indeed the best and proper judges.

*Motte*, 21 How. St. Tr. 687 (21 Geo. III, 1781), and the *Trial of David Tyrie*, 21 How. St. Tr. 815 (22 Geo. III, 1782).

The report of the *De la Motte* case sets out the indictment in full. The same overt acts were alleged under a compassing count and under an adhering count. They included writing and causing to be written documents conveying intelligence to the French, with whom the English were again at war; writing and causing such documents to be written, "to be sent" to the French; and actually sending or causing them to be sent "from the parish aforesaid, in the county of Middlesex aforesaid, to be delivered, in parts beyond the seas." Other overt acts included procuring one Ratcliffe, within the county, to carry documents conveying intelligence from England to France; taking papers to the defendant's house to be sent to the French; and hiring one Lutterloh to gather and send intelligence to them. (21 How. St. Tr. 698-704.) Here we have alleged as overt acts of adherence about every conceivable step in the process of providing intelligence to the enemy falling short of actually transmitting it into the enemy's hands.

It appeared at the trial that the defendant had hired Ratcliffe to carry parcels to France from England, and that parcels were accordingly carried which contained letters the contents of which were not proven. The defendant was arrested upon coming into his house in Middlesex, and attempted to conceal papers in his pockets from the arresting officers. There was also evidence that the defendant had hired Lutterloh to obtain and

send information to the French, and there was testimony that certain letters which had been stopped at the post office were in the defendant's handwriting.

The defendant contested the proof of his handwriting, denied hiring Lutterloh to get or send intelligence, and claimed that the finding of papers in the defendant's possession when he was apprehended was the result of a trap set by Lutterloh to catch an innocent man. He contended that it had not been proven that Ratcliffe had been hired to carry documents, and claimed that no document proved against him could have given intelligence to the enemy. Some of the documents appear to have been quite innocent on their face.

Mr. Justice Buller, in his charge to the jury, adverted to the treasons of compassing and of adhering and then said (21 *id.*, 808)—

The compassing the death of the king is the act of treason; and the overt acts which are laid in the indictment (the evidence of which I shall state to you presently) are only the means which are made use of to effectuate the intentions and the imaginations of the heart. In this way the crime of treason has been defined by our ancestors, and has been settled for ages past. The overt acts, of which the evidence has been given to you, consist of collecting intelligence for the purpose of supplying the enemy with it, of sending intelligence to the enemy, and of hiring persons for the purpose of collecting that intelligence in this kingdom. The sending of intelligence, or collecting intelligence; for the purpose of sending it to an enemy, to enable them to annoy us or to defend themselves, though it be never delivered to the

enemy; or the hiring of a person for that purpose, is an overt act of both species of treason which I am stating to you from this indictment. \*

Thus Mr. Justice Buller declared that sending intelligence to the enemy constitutes an overt act of compassing as well as of adhering.<sup>115</sup> Even defense counsel apparently is willing to concede that the significance of the act of sending intelligence does not depend upon its significance as in itself showing the existence of a treasonable intent, so far as the crime of adherence is concerned.<sup>116</sup>

Mr. Justice Buller does not seem to extend the crime of adherence beyond cases of giving aid and comfort to the enemy, in the sense of at least doing what increases the enemy's chances. He goes so far as to suggest that the collecting of information with the intention of sending it to the enemy constitutes an overt act of adherence as well as of compassing.

The *Trial of David Tyrie, supra*, the last case in this series, also involved an indictment charging compassing and adhering growing out of the interception of letters claimed by the prosecution to have been letters of intelligence, but which the defendant claimed to have been directed merely to a smuggling enterprise.

All but one of these eleven cases involving charges of adherence to the enemy also involved a compassing charge. While the cases abun-

<sup>115</sup> This accords with the arguments of the Attorney General and Solicitor General, 21 *id.* 721, 797.

<sup>116</sup> 21 *id.* 772.



dantly illustrate the defects for analytical purposes of a system of swift justice operating without benefit of appellate review, they do offer the beginning outlines of the treason of adhering. There seems to be a perceptible trace of a tendency to expand its scope by techniques similar to those employed with respect to the charge of compassing the death of the king. The cases do show a keen realization of the realities of warfare and the dangers to be apprehended from the enemy. There is a willingness in some respects to accept as evidence that which would very probably be regarded as insufficient evidence of an overt act of treason today. This appears most sharply in the cases holding that the interception of letters at the post office, and testimony of witnesses predicated on their professed familiarity with the defendant's handwriting that such letters had been written by the defendant, constitute proof that he had written and dispatched the letters, in the absence of any direct evidence to that effect. But this aspect of such cases does not affect the policy underlying their indication of the relation of the act and intent elements of the crime and the extent to which aid and comfort must be conferred.

In contrast to the law with respect to the treason of adhering, the law with respect to the treasons of compassing and levying war was well developed in England before the adoption of the United States Constitution. These latter branches of treason present important analogies and historical problems which must be considered if the handful of adhering cases is to be placed in their proper setting.

According to Mr. Luder's translation of the statute of 25 Edw. 3 (set forth, along with the original French and an earlier English translation, in a footnote at 5 How. St. Tr. 971-977), it declared treason to exist—

In case where a man doth compass or imagine the death of our Lord the King, the Lady his Consort, or of their eldest son and heir; or if a man violate the King's Consort, or the King's eldest daughter being unmarried, or the consort of the King's eldest son and heir. And if a man levy war against our said Lord the King in his realm, or be adherent to the enemies of our Lord the King in the realm, giving to them aid and support in his realm or elsewhere; and thereof be attainted upon due proof of open deed by people of their condition.

On its face the statute would seem to make no requirement for commission of the treason of compassing the king's death beyond entertaining the proscribed mental state.<sup>117</sup> Indeed, the view apparently obtained at an early date that there could be conviction for entertaining the mental intention without more.<sup>118</sup> It was soon recognized, however, that there could be no conviction if the mental state were not translated into action in some manner, and there are numerous statements in the cases such as the following by Attorney General Coke in the trial for the Gunpowder Plot, 2 How. St. Tr. 159, 167 (3 James I, 1606).

<sup>117</sup> But see Lord Chief Justice Treby in the *Trial of Captain Vaughn*, *supra*, pp. 497-498.

<sup>118</sup> Y. B. 19 Hy. VI Mich. pl. 103, set forth in Holdsworth, *History of English Law* (3d ed.) p. 292, n. 7.

For treason is like a tree whose root is full of poison, and lieth secret and hid within the earth, resembling the imagination of the heart of man, which is so secret as God only knoweth it. Now the wisdom of the law provideth for the blasting and nipping, both of the leaves, blossoms, and buds which proceed from this root of Treason; either by words, which are like to leaves, or by some overt act, which may be resembled to buds or blossoms, before it cometh to such fruit and ripeness, as would bring utter destruction and desolation upon the whole state.

The requirement of two witnesses was not embodied in the statute of 25 Edward III, but "rested upon a strained construction of the combined effects of statutes of Edward VI's and Mary's reign."<sup>119</sup> In the absence of that requirement, proof of the treason of compassing apparently could take a wide range. Thus, in the *Trial of Edward Abington*, 1 How. St. Tr. 1141 (14 Elizabeth, 1571), the defendant contended that statements of condemned persons could not be used to prove the crime of compassing. The following colloquy between Lord Chief Justice of the Common Pleas Anderson, Tilney, one of the accused, and the Solicitor, then followed:

ANDERSON. For answer to you, Abington, for the point of the statute, true it is, had you been indicted on the Statute of the 1st and 13th of this queen, two Witnesses ought to have been produced; but you stand indicted by the common law, and the Statute of 25 Edw. 3, which is, who shall intend the

<sup>119</sup> 9 Holdsworth, p. 207.

death of the king, &c. and in that statute is not contained any such proof.

TILNEY. The statute of 25 Edw. 3 is, who shall compass or imagine, &c.

ANDERSON. Very well, and not contained to prove by witnesses, as you would have it.

SOLICITOR. See how they would acquit themselves for want of Witnesses; and if it should be as they would have it, then could never any Treason be sufficiently proved. The statute of 1 Eliz. is so, the Overt-Act must be proved by two Witnesses; but the statute of 25 Edw. 3 is, Who shall imagine; how then can that be proved by honest men, being a secret cogitation which lieth in the minds of traitors? And such traitors will never reveal their cogitations unto honest men, but unto such as themselves, and they I hope be no honest men; so then they would have their treasons never revealed.<sup>120</sup>

\* \* \* \* \*

The requirement of two witnesses in no way altered the early conception of the crime as consisting of the proscribed mental state, as will be seen from the following *Resolutions of the Judges upon the Case of the Regicides*, 5 How. St. Tr. 947; 952-974 (12 Charles II, 1660)—

4. It was resolved, that the indictments should be, for compassing the death of the late king, (the very compassing and imagining of the king's death, being the treason within the statute of 25 Edw. 3,) and then that we might lay as many overt-acts as we would, to prove the compassing of his death. But it was agreed, that the actual murder of the king should be precisely-laid in the

<sup>120</sup> How. St. Tr.

indictment, with the special circumstances as it was done; and should be made use of as one of the overt-acts, to prove the compassing of his death.

5. It was resolved, that if any one overt-act tending to the compassing the king's death, be laid in the indictment, that then any other act, which tends to the compassing of the king's death, may be given in evidence, together with that which is laid in the indictment.

As Holdsworth and Stephen have observed,<sup>121</sup> the statute of 25 Edw. III was insufficient to cope with attempts to subvert the government if construed literally, for it made no express provision against conspiracies to depose, imprison or coerce the king, or against conspiracies to create internal disorder.

In course of time, the treason of compassing was held to embrace all these matters by holding that a participant therein must have intended the death of the king.<sup>122</sup> Doubtless this declaration was often quite true as a matter of fact. " \* \* \* as history and experience show, to dethrone the king leads to his death; so a conspiring or design to imprison the king. The distance between the prison of a king and his grave is small indeed." Statement of the Attorney General in *Trial of William Jackson*, 25 How. St. Tr. 783, 806 (34 & 35 Geo. III, 1794, 1795).

Many of the treason trials had backgrounds of serious disaffection of large segments of the people, often extending to violent physical opposition to the national government. Loyalty of the vast

<sup>121</sup> 4 Holdsworth, p. 496.

<sup>122</sup> *Trial of the Duke of Norfolk*, 1 How. St. Tr. 957 (14 Eliz., 1571); *Trial of the Earls of Essex and Southampton*,

preponderance of the population to the national government could by no means be assumed as it is today, and the forces of the national government were characteristically weak. These factors, and a relatively lower level of human sensibilities, are reflected in long-continued lack of procedural

1 How. St. Tr. 1333 (43 Eliz., 1600); *Trial of Sir Christopher Blunt*, 1 How. St. Tr. 1409 (43 Eliz., 1600); *Trials of the Regicides*, 5 How. St. Tr. 947, 1033 (12 Charles II, 1660); *Trial of William Lord Russel*, 9 How. St. Tr. 577, 636 (35 Charles II, 1683); *Trial of Francis Francia*, 15 How. St. Tr. 897, 991 (3 Geo. I, 1717).

The *Duke of Norfolk's Case*, *supra*, involved acts of adhering to the enemy employed as overt acts of compassing. This case and others, particularly *Story's Case*, 3 Dyer 298b (13 Eliz., 1570), are frequently loosely cited as arising under the adhering branch of the statute of Edward III. Cf. *Patrick Harding's Case*, 2 Vent. 315 (2 Wm. & Mary, 1691).

The simplicity of the process of creating treasons of constructive compassing is illustrated by the following statement by Attorney General Sir Edward Coke in the *Trial of the Earls of Essex and Southampton*, *supra*, (p. 1337) —

\* \* \* the thought of Treason to the prince, by the law is death; and he that is guilty of Rebellion, is guilty of an intent (by the laws of the land) to seek the destruction of the prince, and so adjudged Treason \* \* \*

Compare the following colloquy between Lord Chief Justice Popham and the Queen's Counsel in the *Trial of Sir Christopher Blunt*, *supra*, (p. 1410) —

E. C. J. Wherever the subject rebelleth, or riseth in a forcible manner to over-rule the royal will and power of the king, the wisdom and foresight of the laws of this land maketh this construction of his actions, that he intendeth to deprive the king both of crown and life;



safeguards for defendants,<sup>123</sup> and in punishments which would be thought barbarous today.<sup>124</sup> The same factors are no doubt reflected to some extent in the broad applications of the treason of

for the law judgeth not of the fact by the intent, but of the intent by the fact.

*Queen's Counsel.* This construction is no mystery or quiddity of law, but an infallible conclusion warranted by reason and experience: for the crown is not a garland, or mere outward ornament, but consists of pre-eminence and power; and therefore when the subject will take upon him to give law to the king, and to make the sovereign the commanding power become subject and commanded, such subject layeth hold of the crown, and taketh the sword out of the king's hand. The crown is so fastened upon the king's head, that it cannot be pulled off, but head and life will follow, as all examples at home and abroad do manifest \* \* \*

<sup>123</sup> 9 Holdsworth, pp. 223, *et seq.*

<sup>124</sup> The sentence in the *Parkyns* case (13 How. St. Tr. 136) is typical—

That you, and each of you, go back to the place from whence you came, and from thence be drawn on a hurdle to the place of execution, where you shall be severally hanged up by the neck, and cut down alive; your bodies shall be ripped open, your privy members cut off, your bowels taken out and burnt before your faces; your heads shall be severed from your bodies, your bodies respectively to be divided into four quarters, and your heads and quarters are to be at the disposal of the king; and the Lord have mercy upon your souls.

The king frequently disposed of the parts of the body by having the head put up on London Bridge, and one quarter placed at each gate of the city. Thomas More's sentence was remitted by the king to simple beheading, but nevertheless his head was placed on London Bridge for several months. As it was "about to be thrown into

compassing.<sup>125</sup> Here again the compassing branch was brought to bear on the ground that the particular conduct manifested or proved that the defendant had compassed or imagined the death of the king.

the Thames to make room for others; his daughter Margaret bought it." (1 How. St. Tr. 396.)

Considerable ingenuity was exercised in earlier times. The Duke of Clarence was done to death by "thrusting his head into a butt of Malmesey." (1 How. St. Tr. 275.) And the killing of the deposed Edward II was a master-piece of a sort. (1 How. St. Tr. 50.)

<sup>125</sup> See, e. g., *Case of Edward Peacham*, 2 How. St. Tr. 869 (12 James I, 1615); *Trial of John Twyn*, 6 How. St. Tr. 513 (15 Charles II, 1663); *Trial of Algernon Sidney*, 9 How. St. Tr. 817 (35 Charles II, 1683); *Trial of Thomas Rosewell*, 10 How. St. Tr. 147 (36 Charles II, 1684); *Trial of Joseph Hayes*, 10 How. St. Tr. 307 (36 Charles II, 1684); *Trial of Lady Alice Lisle*, 11 How. St. Tr. 297 (1 James II, 1685); *Trial of William Anderton*, 12 How. St. Tr. 1245 (3 Wm. & Mary, 1693); cf. *Proceedings against Duke of Clarence*, 1 How. St. Tr. 275 (18 Edw. IV, 1478); *Trial of Sir William Stanley*, 1 How. St. Tr. 277 (10 Hen. VII, 1494-1495). These cases have been chosen as marking the limits to which the treason of compassing was pushed. In evaluating them, it should be borne in mind that most of them were decided when "prerogative ran pretty high." Remarks of Solicitor General on *Sidney's Trial*, 9 How. St. Tr. 999, 1002. It should be noted, however, that although the decision in *Peacham's* case apparently was the result of royal interference his sentence was never executed. *Ibid.* Sidney's attainder was annulled by an Act of Parliament during the reign of William and Mary which declared his conviction unlawful. (9 How. St. Tr. 996.) Rosewell received a Royal pardon. (10 How. St. Tr. 302-303.) Hayes was acquitted by the jury despite a strong charge by Lord Chief Justice Jeffreys. The attainder of Lady Lisle was reversed by an Act of Parliament in the first year of the

The effect of this expansive application of the compassing branch, resulting in the creation of numerous constructive treasons, was to give the charge of compassing a significance beyond that of factual proof, of the proscribed state of mind. As an analytical matter, if given conduct were held as a matter of law to prove an intent that it did not prove as a matter of fact, it was really immaterial whether the defendant had entertained that intent. Thus, when conspiracy to imprison the king was held as matter of law to fall within the compassing branch, the real issue would not be whether the defendant had actually compassed or imagined the death of the king, but whether he had engaged in a conspiracy and had entertained the intent to imprison the king.<sup>126</sup> If he had not so engaged, or had not so intended, he would not be guilty of the crime of compassing.

reign of William and Mary. (11 How. St. Tr. 381.) Anderton and Twyn were regularly executed. The Duke of Clarence was secretly put to death. (1 How. St. Tr. 275.) Bacon reports that Stanley's fate was influenced by "the glimmering of a confiscation; for he was the richest subject for value in the kingdom." (1 How. St. Tr. 281.)

<sup>126</sup> Lord Chief Justice Holt stated the matter in typical fashion when he charged the jury in *Freind's* case, *supra* (13 How. St. Tr., p. 61) —

Then there is another thing that he did insist upon, and that is matter of law. The statute of the 25th Edw. 3. was read, which is the great statute about treasons; and that does contain divers species of treason, and declares what shall be treason. One treason is the compassing and imagining the death of the king; another is the levying of war: Now, says he, here is no war actually levied; and a bare conspiracy or design to levy war does not come within this law against treason. Now for that, I must tell you, if there be only a conspiracy to levy war, it is

In this way a treason which was defined and originally regarded as consisting simply and actually of a particular state of mind was expanded to make treason of conduct carried on with a different state of mind.

Another development of the law of compassing served to give that head significance different from that which it originally had. While in some periods persons apparently were convicted for compassing as the result of "mere" spoken words, it came to be recognized that such words would not suffice.<sup>127</sup> This was apparently the result of an appreciation that talk was cheap and often loose, and that a man ought not be convicted without more reliable proof.<sup>128</sup> *Croghan's Case*, Cro. Car.

not treason: but if the design and conspiracy be either to kill the king, or to depose him or imprison him, or put any force or restraint upon him, and the way and method of effecting these is by levying a war, there the consultation and the conspiracy to levy a war for that purpose, is high-treason, though no war be levied: For such consultation and conspiracy is an overt-act proving the compassing the death of the king, which is the first treason mentioned in the statute of the 25th of Edw. 3.

<sup>127</sup> *Case of John Owen*, 2 How. St. Tr. 879 (13 James I, 1615); *Case of Hugh Pine*, 3 How. St. Tr. 359 (4 Charles I, 1625); statements of the Attorney General in the *Trial of Thomas Crossfield*, 26 How. St. Tr. 1, 185 (36 Geo. III, 1796); cf. *Case of Williams*, 2 How. St. Tr. 1085 (17 James I, 1619); Charge to the Jury by Lord Chief Justice Jeffreys in *Sidney's case*, *supra* (9 How. St. Tr. 889-890). But cf. *Trial of Thomas Roscettell*, *supra*, note 126.

<sup>128</sup> See Remarks on *Sidney's Trial* by Sir John Hawles, Solicitor General in the Reign of William the Third, 9 How. St. Tr. 999, 1002, 1003; cf. *Charnock's Case*, 2 Salk. 631 (8 Wm. III, 1696).

332 (10 Charles I, 1634) where an Irish priest in Lisbon declared that he would kill the king if he might come to him, and later did come to England, to be regarded as one where the coming to England constituted the overt act. For example, the Attorney General explained the case in the *Trial of Thomas Hardy*, 24 How. St. Tr. 199, 1985 (35 Geo. III, 1794) as follows:

Your lordship knows that his making the declaration, though it would be punishable in another way, yet still would not be high treason, if he had not come into England; and upon the whole of the evidence, the coming into England made a part of the transaction with the declaration he had made, it was an overt act of high treason, because it was then understood to be a fact done with the intention which the indictment imputed.<sup>129</sup>

In this way it came to be that spoken words which on their face evidenced the intent did not constitute an overt act of compassing, while other conduct, innocent on its face, did constitute an overt act of compassing if shown by other evidence to have been done with that intent.

In sum, then, there came to be recognized as overt acts of compassing certain conduct carried on with no actual intent, or at least without primary intent, to kill the king, but with an intent to achieve some other end, and conduct seemingly innocent on its face shown by other evidence to have been carried on with a treasonable intent;

<sup>129</sup> But cf. Remarks on *Sidney's Trial* by Sir John Hawles, Solicitor General in the Reign of William the Third, 9 How. St. Tr. 999, 1004.



while on the other hand verbal conduct which on its face did manifest such an intention was not so recognized.

The branch of the statute defining adherence perhaps did not provide as pliant materials for fashioning constructive treasons. Unlike the treason of compassing and like the treason of levying war, the treason of adherence seems defined primarily in terms of conduct. The statute did not stop with the words "be adherent to the enemies of our said Lord the King," but went on to add "giving to them aid and support \* \* \*". The statute appears therefore to deny an opportunity to seize on conduct and declare it to constitute the treason of adherence on the ground that it shows as a matter of fact or law a mental state of attachment to the enemy. On its face, it would seem, more obviously than the compassing provision, to require some quite definite translation of thought into action, as a requisite to the commission of the treason of adherence.

Thus it would seem that the treason of adherence could be given expansive scope only by giving broad meaning to the words "enemies," or "giving aid and support."

The cases of adherence stated above disclose no effort to give expansive application to the term "enemy." The opinion of Coke that adherence to rebels was not adherence to enemies was advanced by counsel for the defendant in *Cook's* case, and met with the apparent acquiescence of the judges. (13 How. St. Tr. 330.) The other cases also quite clearly imply that the treason of adher-



ence could not be committed in the absence of actual war.

The cases on adherence considered above on the whole sustain the proposition that an accomplished fact of aid and comfort in the ordinary sense is not necessary to the crime of treason by adherence. There is sound policy why the crime may be held to have been committed, although in the particular instance the specific aid which the accused intended to give was not in fact conferred, as where a letter containing information of value to the enemy's war effort is intercepted. To an even higher degree than other human enterprises, war is a matter of chance. The greater the number of times that efforts are made to give aid to the enemy, the greater is the probability that on some occasions the specific aid intended will get through. In this sense, the very effort to give aid, by increasing by one the number of chances which the enemy has to receive the kind of assistance intended, in itself constitutes aid to the enemy. Of course not every act, however remote from the possibility of a conferring of aid and comfort, will thus add to the number of "chances" which the enemy enjoys; we are dealing with a practical doctrine in the administration of law. "Treason is clearly a crime of the nature of an attempt; and there is no lack of practical experience to show that a workable standard is involved in the concept of conduct which may be said to increase the chance of the occurrence of a result which the law seeks to prevent.

On the other hand, the cases carry some implication that a conspiracy which did not actually reach this stage was insufficient. There is, moreover, no trace of any effort to employ this branch of the statute to deal with domestic disputes on the theory that by causing trouble at home the defendant weakened the country and thereby gave assistance to the enemy.

On the whole the treason of adherence was much more akin to the treason of levying war than to that of compassing. It was perfectly well settled that levying war could not be committed by a mere conspiracy,<sup>130</sup> and it was clearly regarded as requiring commission of the proscribed conduct, rather than the existence of an actual or presumed mental state. While levying war was held to include conduct which we would probably regard as mere riots<sup>131</sup> today, a man could be convicted only if he participated in some way in the actual conduct of levying war as so defined. The treason of adherence was kept distinct, in that giving aid and comfort to rioters guilty of levying war was under the broad meaning given that term would not be guilty adhering to the enemy.

Although the gist of the treasons of adherence and levying war was the commission of proscribed conduct in the sense that the necessity of establishing an overt act as a separate element of the offense was there more sharply asserted, intent was of course an element of both in the very real sense that there could be no conviction in its ab-

<sup>130</sup> See footnote 126, *supra*; Paragraph 3 of Resolutions of Judges, reported in 5 How. St. Tr. 984, footnote.

<sup>131</sup> *Trial of Daniel Danimarce*, 15 How. St. Tr. 521 (9 Anne, 1710).

sence. Thus, a participant in the conduct was not guilty if his participation was involuntary.<sup>132</sup> On the other hand the overt act was an element of the treason of compassing in the same sense. The difference was that as the latter crime evolved its analysis lacked clarity, since it was habitually stated that the overt act manifested or proved the compassing, while as a matter of fact it might do no such thing if by this was meant that its function was to evidence the intent.

There appears to be no support in the English cases for the notion that an overt act of adherence must not only give aid and comfort to the enemy but also actually be evidence of the treasonable intent. Statements that an overt act must manifest or prove the intent grew out of the original concept of the treason of compassing, and as that concept developed had no real significance in many of the compassing cases themselves.<sup>5</sup> To apply them in any significant sense to the treason of compassing would go in the face of the whole historical development of the English law of treason.

The English cases sustain a literal application of the words of the branch of the statute defining adherence. On the one hand this course requires rejection of a refinement of construction which would mean that the more skilled and less obvious the artifice employed to give aid and comfort to the enemy, the greater the degree of immunity from conviction. On the other hand it confines

<sup>132</sup> Cf. *Trial of Sir John Wedderburn*, 18 How. St. Tr. 425 (20 Geo. II, 1746); *Proceedings against John Frith*, 22 How. St. Tr. 307 (30 Geo. III, 1790).

punishment to cases of conduct having an actual tendency to give aid and comfort to the enemy in time of war.

## II

### TREASON IN AMERICA

#### I. TREASON DOWN TO THE CONSTITUTION

##### (a) *Prior to the Revolution*

In most of the colonies there was at some stage some legislative definition or at least recognition of the existence of an offense of treason. Charters and proprietary grants and the royal instructions to colonial governors sometimes conferred authority to exercise martial law for the suppression of what might amount to treason. There were scattered prosecutions for treason in the colonies, but we have few reports of these and no evidence to suggest that there developed a common law of treason or any substantial gloss upon the legislative provisions. However, the statutory offense was generally outlined or recognized in sufficiently general terms to give room for a creative role of the executive in deciding what to prosecute and of the judges in interpreting the scope of the crime.

Taking the colonial period as a whole, in most of the colonies the definition of the offense was clearly thought of in terms of the English legislation stemming from the Statute of 25 Edward III. However, this is not true of the earliest

references to the crime, mainly in the northern colonies. The authority given in charters and grants and in instructions to royal governors is not put in familiar words of art, but merely approves resort to martial law for the suppression of "rebellion", "sedition", or perhaps "mutinies". The North Carolina Charter of 1665 was unusually explicit; but it, like the others, does not use traditional language when it confers power

to exercise martial law against any mutinous and seditious persons of these parts; such as shall refuse to submit themselves to their government, or shall refuse to serve in the war, or shall fly to the enemy, or forsake their colours or ensigns, or be loiterers, or stragglers, or otherwise offending against law, custom, or military discipline.

The *Laws of New Haven Colony*, as published in London in 1656, contained this provision, which has no resemblance to any familiar English model:

If any person shall conspire, and attempt any invasion, insurrection, or publick Rebellion against this Jurisdiction, or shall endeavour to surprize, or seize any Plantation, or Town, any Fortification, Platform, or any great Guns, provided for the defence of the Jurisdiction; or any Plantation therein; or shall treacherously and perfidiously attempt the alteration and subversion of the frame of policy, or funda-

5 Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws* (Government Printing Office, Washington, 1909) 2770; cf. 3 *id.* 1833, 1866 (Massachusetts Bay); 5 *id.* 3049, 3056, 3065, 3074 (Pennsylvania).

mentall Government laid, and settled for this Jurisdiction, he or they shall be put to death. *Num.* 16. 2 *Sam.* 18. 2 *Sam.* 20. Or if any person shall consent unto any such mischievous practice, or by the space of foure and twenty houres conceale it, not giving notice thereof to some Magistrate, if there be any Magistrate in the Plantation, or place where he liveth, or if none, to some Deputy for the Jurisdiction, or to the Constable of the place, that the publick safety may be seasonably provided for, he shall be put to death, or severely punished, as the Court of Magistrates weighing all circumstances shall determine.<sup>2</sup>

The biblical citations suggest that this provision was not drawn with any primary attention to following English materials. A much similar provision was contained in the *General Laws* of Connecticut (1673), which under the heading "Capital Laws" declared:

12. If any person shall conspire or attempt any Invasion, Insurrection or publick Rebellion against this Colony, or shall Treacherously and Perfidiously attempt the Alteration and Subversion of our Frame of Government Fundamentally established by His Majesties Gracious Charter Granted to this Colony, by endeavouring the betraying of the same into the hands of any foreign power, he shall be put to death.<sup>3</sup>

<sup>2</sup> *Laws of New Haven Colony* (London, 1656; edition by State Library, Hartford, 1858) \*24.

<sup>3</sup> *The Book of the General Laws* (Connecticut), (Printed by Samuel Green, Cambridge, 1673, reprinted, Hartford, 1865), p. 9.



The *Laws of the Colony of New Plymouth*, in the revision of 1636, had merely included under "Capitall offences lyable to death",

Treason or rebellion against the person of the King, State or Commonwealth, either of England or these Colonies.

But the *General Laws and Liberties of New Plimouth Colony, 1671*, in Chapter II, "Capital Laws", expanded the definition in terms like those of the New Haven act:

3. Treason against the Person of our Sovereign Lord the King, the State and Common-wealth of England, shall be punished by death.

4. That whosoever shall Conspire and Attempt any Invasion, Insurrection, or Publick Rebellion against this Jurisdiction, or the Surprizal of any Town, Plantation, Fortification or Ammunition, therein provided for the safety thereof, or shall Treacherously and Perfidiously Attempt and Endeavour the Alteration and Subversion of the Fundamental Frame and Constitutions of this Government; every such Person shall be put to Death.

The last provision was in substance included in *The General Laws and Liberties of Massachusetts Bay* (May, 1678), with about the same biblical citations as in the New Haven provision, and in the *Duke of York's Laws* (1665-1675), compiled from the statutes for the government of the other

---

The Compact with the Charter and Laws of the Colony of New Plymouth. Published agreeably to a resolve of the legislature, under the supervision of William Bingham. (Boston, 1836). Pp. 42, 244.

northern English colonies in America by the first English governor, Nicolls, as well as in the criminal code adopted in 1668 by Carteret's Assembly in New Jersey and the *General Laws and Liberties of the Province of New Hampshire*, of 1679.<sup>3</sup>

The bulk of colonial legislation on treason, including the later statutes in the northern colonies, looks to English law for the definition of the offense. Some of these acts adopt the phraseology

<sup>3</sup> The Charters and General Laws of the Colony and Province of Massachusetts Bay. (Published by order of the General Court.). (Boston, 1814) Ch. XVI, sec. 12;

1 Colonial Laws of New York (1664-1775) (Published under authority. Albany, 1895) 20; Leaming and Spicer,

Grants, Concessions and Original Constitutions (1664-1702) of the Province of New Jersey (Philadelphia, 1758)

80; 1 Laws of New Hampshire (Batchellor, ed. Manchester, 1904) 12. The Duke of York's Laws were also applied in the area which became Pennsylvania, before 1682.

See George, Nead and McCannant's Charter to William Penn and Laws of the Province of Pennsylvania (Harrisburg, 1879) iv, 15. Compare the terms of the oath included in

the instructions from the General Court of New Plymouth Colony to Thomas Prence, commissioned for erecting an

orderly government among the inhabitants of the Kennebeck:

beck:

You shalbe true and faithfull to the State of England as it is now established and whereas you chese att present to Reside within the Government of New Plymouth you shall not doe or cause to be done any acte or actes directly or indirectly by land or water that shall or may tend to the destruction or overthrow of the whole or parte of this government that shallbee orderly erected or established: but shall contrary wise hinder oppose and discover such intents and purposes as tend thereunto to those that are in place for the time being that the Government may be enforced thereof with all convenient speed;

of the Statute of 25 Edward III, with additions inspired by local problems. The earliest indication of this reliance on the Statute of Edward seems to be the text of "An Act for Treasons" which was considered, but not passed, at the session of the Maryland General Assembly in February-March, 1638. Bacon tells us that:

By this Bill the following Offences were to be adjudged Treasons within this Province,

Brigham, *op. cit. supra*, note 4, p. 322. Another unconventional early definition of treason was laid down in Act I of the Virginia Grand Assembly, session of October 10, 1649. Reciting that evilly disposed persons were defending the legality of the proceedings against Charles I and deducing that the existing government of the Commonwealth was without legal authority, this act provided that any stranger or inhabitant who should "by reasoning, discourse or argument" defend or maintain the proceedings against the late king, "and being proved by competent witnes, shall be adjudged an accessory *post factum*, to the death of the aforesaid King, and shall be proceeded against for the same, according to the knowne lawes of England," and—apparently adding a different offense of seditious speech—that whoever by irreverent words should go about to blast the memory of the King should suffer such punishment as found suitable by the Governor and Council. Moreover, the Act provided, whoever by words or speeches endeavors to insinuate any doubt regarding the right "of his Majesty that now is" to the colony and all others of his dominions, as King, "such words and speeches shall be adjudged high treason." See 1 Henning, *Statutes at Large* (New York and Philadelphia, 1823) 359, note. But, "The submission of Virginia to the commonwealth soon afterward (1652) made this drastic law a dead letter \* \* \* Scott, *Criminal Law in Colonial Virginia*

viz. To compass or conspire the Death of the King, or the Queen his Wife, or of his Son and Heir; or to levy War against his Majesty, or to counterfeit the King's Great or Privy Seal, or his Coin; or to join or adhere to any foreign Prince or State, being a professed Enemy of his Majesty, in any Practice or Attempt against his said Majesty: Or to compass, conspire, or cause the Death of the Lord Proprietary within this Province, or of his Lieut. General for the Time being, (in Absence of his Lordship,) or to join, adhere or confederate with any *Indians*, or any foreign Prince or Governor to the invading of this Province, or disheriting the Lord Proprietary of his Seignory and Dominion therein. All Offences of Treason to be punished by Drawing, Hanging and Quartering of a Man, and Burning of a Woman; the Offender's Blood to be corrupted, and to forfeit all his Lands, Tenements, Goods, &c. to his Lordship. But Punishment of Death to be inflicted on a Lord of a Manor by Beheading.

(Chicago, 1930) 155. Regarding the similarities in the early legislation of the colonies north of Maryland, see Edsall, ed., *Journal of the Courts of Common Right and Chancery of East New Jersey, 1683-1702* (American Legal History Society, Philadelphia, 1937) 113, 116.

\* *Laws of Maryland at Large*, by Thomas Bacon. (1637-1754), (Annapolis, 1765), Assembly of February 25-March 19, 1638, No. 22. Bacon notes that at the previous General Assembly of January 25-March 24, 1637, the Freemen, having rejected a Body of Laws drawn in England and transmitted by the Proprietor to be passed in the colony, sub-

Chancellor Kilty notes that:

In the year 1642, an act was passed [Act of August 1, 1642, July Session, 1642, Ch. 19, renewed until 1645 by Act of September 13, 1642, September Session, 1642, Ch. 45], ordaining punishment for certain greater capital offences, in which were comprised all offences done within the province, which are declared treasons by statute of 25 Edw. 3, Ch. 2, and all offences of conspiring the death or destruction, or of attempting any violence against the person of the lord proprietary, &c. or of holding any private intelligence with a declared enemy of the province, or of rising in arms, or mutinying against the lord proprietor, &c. This act was at first of very short duration; but it was re-enacted at another session in the same year, and expired in 1645.

An act was passed in 1649 (Ch. 4,) for the punishment of certain offences against the peace and safety of the province, which related only to mutinous and seditious speeches, practices or attempts, with or without force.

No other act respecting treason was passed in the province, and the necessity of enacting that of 1642, arose probably from the opinion at first entertained, that in criminal cases, the statutes of England did not extend to the province; and to the change of that opinion may be attributed,

mitted to him a number of bills including Number 36, "A Bill for Treasons." These were never enacted, however, and copies of them have been lost.

the circumstance of no further acts being passed on this subject.

The Connecticut *Acts and Laws* (1792) added to the special provisions already noted in the laws of that colony the more familiar declarations:

That if any person or persons, shall compass or imagine the Death of our Sovereign Lord the KING, or of our Lady the QUEEN, or of the Heir apparent to the Crown; or if any person shall levy War against our Lord the KING, or be adherent to the Kings Enemies, giving them aid, and comfort in the Realm, or elsewhere, and thereof be probably attainted of open deed by His Peers, upon the Testimony of two Lawful and Credible Witnesses upon Oath, brought before the offender face to face, at the time of his arraignment; or voluntary confession of the party arraigned. Or if any person or persons shall counterfeit the Kings Great Seal, or privy Seal, and thereof be duly convicted, as aforesaid, then every such person and persons, so as aforesaid Offending, shall be deemed, declared, and adjudged, to be Traitors, and shall suffer pains of Death, and also lose and forfeit as in cases of High Treason.

And be it further Enacted by the Authority aforesaid, That the Tryal of all, and every person and persons whatsoever, accused, indicted and prosecuted for High Treason, and misprision of such Treason, shall be

---

Kilty, A Report of All Such English Statutes, etc. (Annapolis, 1811) 217-220. The Chancellor's remarks are part of a note to his recommendation that the Statute of Edward III be included in the list of English statutes drawn up by him at the request of the legislature, to be declared applicable in the State of Maryland.



regulated according to Act of Parliament made in the Seventh year of His present Majesties Reign, Entituled, *An Act for Regulating of Tryals in Cases of Treason and Misprision of Treason*; and the party so accused, indicted and prosecuted, to be allowed the benefits and privileges, in and by the said Act granted and declared.

Similar legislation had been passed in the Massachusetts Bay Colony in 1692 and 1696, and acts of 1706 and 1744 likewise incorporated the procedural guaranties of the statute of 7 William III into more specific legislation directed against "traiterous correspondence with his Majesty's enemies". In New Hampshire, the Act of May

*Acts and Laws (1702) of His Majesties Colony of Connecticut.*—(Printed by Burtholmeu Green and John Allen, Boston, 1702, Reprint, Hartford, 1901) 13-14. This revision, however, also continued the "Capital Laws" provision of 1673 (note 3, *supra*); and both types of treason provision appear in Acts and Laws (1715) (Printed by Timothy Green, New London, 1715), *id.* (1743) (Printed by Timothy Green, New London, 1743), *id.* (1750) (Printed by Timothy Green, New London, 1750), *id.* (1769) (Printed by Thomas and Samuel Green, New Haven, and Timothy Green, New London, 1769). The "Capital Laws" provision disappears with the first post-Revolutionary revision, in 1781.

*Act of October 22, 1692 (2d Sess., Ch. 19), 1 Acts and Resolves of the Province of Massachusetts Bay* (Published by authority, Boston, 1869-1905) 55 (disallowed by the Privy Council, August 22, 1695, 1 *id.* 56; see note 12, *infra*); *Act of December 8, 1696 (3d Sess., Ch. 12), 1 id.* 255; *Act of August 31, 1706 (2d Sess., Ch. 8), 1 id.* 595; *Act of June 26, 1744 (1st Sess., Ch. 6), 3 id.* 152; *Act of March 31, 1755 (4th Sess., Ch. 34), 3 id.* 814; cf. *Act of May, 1678, Ch. XVIII, The General Laws and Liberties of Massachusetts Bay, op. cit. supra*, note 5.

15, 1714, followed the Connecticut and Massachusetts pattern.

More numerous were provisions which, in varying terms, declared that the offense of treason should be as defined, proceeded against and punished as under the laws of England. Although some of these acts in terms seem limited to incorporating the procedural or penalty provisions of the English law, they evidence a general inclination to look to that law for guidance, and none of them contains anything denying the applicability of English concepts of the scope of the offense. Such legislation is found in Delaware, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, and possibly Virginia. Of the colonies, only Georgia and New Jersey seem not to have adopted legislation of one of these types.<sup>10</sup>

Surveillance exercised by the authorities in the mother country served, further, to enforce aware-

<sup>10</sup> Acts and Laws Passed by the General Court or Assembly of His Majesties Province of New Hampshire in New England. Printed by B. Green: Sold by Eleazar Russel at his Shop in Portsmouth, 1716. 4 Boston, 1766; reprint, 1885; p. 46. Despite its repeal by the Crown, August 27, 1718, this act is continued in the compilations of 1726 and 1765 (same title as above), but is lacking in the compilation of 1771, with no explanation given. See 2 Laws of New Hampshire, *op. cit. supra* note 5, p. 141.

<sup>11</sup> Delaware: Laws, 1719, Ch. XXII, in 1 Laws of the State of Delaware (1700-1797) (Published by Authority, Printed by Samuel and John Adams, New-Castle, 1797) 64; and Laws, 1742, Ch. LXXXIV, *id.* 225. New York: Act of June 27, 1704, 1 Colonial Laws (1664-1775), (Published under authority, Albany, 1894) 575; Act of December 24, 1767, 4 *id.* 953 (see note, p. 953). North

ness of the English law of treason in the definition of the offense in America. Thus, although the Massachusetts act of 1692 already referred to, had

Carolina: Laws, 1711, Ch. I, 25 State Records of North Carolina (Clark, ed. Goldsboro, 1904-06) 152; Laws, 1715, Ch. XXXI, 23 *id.* 38; Laws, 1715, Ch. LXVI, 23 *id.* 94 (repealed, Laws, 1749, Ch. VI, 23 *id.* 332); Laws, 1749, Ch. I, 23 *id.* 317. Pennsylvania: Act of May 31, 1718, Ch. CCXXXVI, 3 Statutes at Large (1682-1801) (Compiled under authority by James T. Mitchell and Henry Flanders, Harrisburg, 1896-1915) p. 199. Rhode Island: "An ACT regulating sundry Proceedings in the several Courts in this Colony" (noted as 1700, 1716, 1718, 1729, 1734, 1736, 1746, 1749, 1750 and 1760), in Acts and Laws (1767) of the English Colony of Rhode Island and Providence-Plantations (Printed by Samuel Hall, Newport, 1767), p. 55; see Acts and Laws, 1728, "An Act for punishing Criminal Offences," in Acts and Laws of His Majesty's Colony of Rhode Island and Providence-Plantations, in America, 1663-1729 (Printed by James Franklin, Newport, 1730) 169. South Carolina: Act of December 12, 1712, No. 333, 1 Laws of Province (Collected by Nicholas Trott, Printed by Lewis Timothy, Charles-Town, 1736); see Grimke, Public Laws of the State of South-Carolina (Philadelphia, 1790) 34. Virginia: The applicability of English law seems fairly implied from references in Act I of the Grand Assembly Session of October 10, 1649 (note 5; *supra*); Act I of the February 1676-7 session and other legislation of that session regarding Bacon's Rebellion, 2 Hening, *op. cit. supra*, note 5, p. 366, ff.; Ch. I, of November, 1714, *id.* See Digest of the Laws of the State of Georgia (1755-1798), (Robert and George Watkins, Philadelphia, 1860) 46.

The failure of a colonial legislature to enact a law on treason might be argued to mean simply that prosecutions must be conducted under the prevailing law of the mother country. This was the opinion of the Attorney General and Solicitor General regarding the proper procedure against alleged traitors in New Hampshire in 1775, the

substantially copied the language of the Statute of Edward III, it was disallowed by the Privy Council, August 22, 1695, because

in y<sup>e</sup> Article of Treason no punishment is inflicted for counterfeiting the Great Seal of England or the seal of y<sup>e</sup> Province nor is that article agreeable to the statute of the 25th of Edward the third in relation to Treason.<sup>12</sup>

The colonial legislature remedied the objections in the act of 1696. Again, the Commissioners for Trade and Plantations objected to the Pennsyl-

New Hampshire treason act having been disallowed by Order in Council in 1718. See Archbold's Pleading, Evidence & Practice in Criminal Cases (31st ed. London, 1943) 1058, note (a), quoted in the opinion of the Court of Criminal Appeal in *Rex v. Casement* (1917) 1 K. B. 98, 143. On the other hand, there is no indication that because of this residual applicability of the English law in the colonies, the latter were ever held to be totally disabled from passing legislation on treason; and the contrary implication is to be drawn from the fact that such colonial acts as were disallowed were voided for more particularly specified reasons. The applicability of English statutes in the colonies in the absence of adoption by local authority has of course been a much mooted point, and it seems unlikely that Americans would have agreed with the opinion of the English law officers in the significant year 1775: Cf. Batchellor, Introduction to 2 Laws of New Hampshire, *op. cit. supra*, note 5, pp. xvii-xviii.

<sup>12</sup> See note 9, *supra*. The Act of December 8, 1696, *ibid.*, was probably passed to meet the objections raised by the Privy Council. Apart from adding the offense of counterfeiting the Great Seal, the 1696 Act made it treasonable to compass the death of the heir apparent, or to give aid and comfort to an enemy "in the realm or elsewhere." Other changes seem to involve terminology only.

vania Act of November 27, 1700, declaring it an offense punishable by forfeiture of half the offender's property or by one year imprisonment to compass the death of the proprietary and governor. The Commissioners stated that:

We think this act not proper to be laid before Her Majesty, the proprietary and governor having already the same protection by law as other Her Majesty's subjects.

Accordingly, the Queen in Council repealed the act, February 7, 1705-6.<sup>12</sup> In New York, the Act of May 6, 1691, abjuring the royal house of Stuart, had declared it treason "by force of arms or otherwise to disturb the peace good and quiet of this their Majestyes Government as it is now Established". The home authorities found this act objectionably broad and vague and instructions were sent the governor to procure its repeal. It was, hence, repealed by the Act of June 27, 1704, whose recital reflects an influence upon the colonists to look for their law to England in this regard:

\* \* \* whereas her most sacred Majesty hath been graciously pleased out of her princely Care for the good and Safety of her Subjects in their Lives and Estates to observe in her Intruccions to the Governor that the meaning of the said Clause hath been of late misinterpreted to the oppression of her Subjects, and is pleased to direct that for preventing the like abuses for the future the said Clause should be repealed

<sup>12</sup> Statutes at Large, *op. cit. supra*, note 11, 52, and note, App. I, Sect. II, p. 465.

the Laws of England having Sufficiently provided for the true purposes thereof.<sup>14</sup>

<sup>14</sup> 1 Colonial Laws, *op. cit. supra*, note 11, pp. 223, 575; 1 Labaree, Royal Instructions to British Colonial Governors, 1670-1776 (N. Y. 1935) 157; cf. *id.* 159 (repeal of Virginia legislation regarding Bacon's Rebellion). The Act thus disapproved in 1704 had, however, originally been confirmed by the King in Council, May 11, 1697. Labaree, *loc. cit. supra*. See also Russell, Review of American Colonial Legislation by the King in Council (N. Y. 1915) 29, 104; Washburne, Imperial Control of the Administration of Justice in the Thirteen American Colonies, 1684-1776 (N. Y. 1923) 48.

As has been noted, the Duke of York's Laws, with the familiar "Capital Laws" provisions against treason (notes 3, 4, 5, *supra*), were included in the New Hampshire Act of March 16, 1679. Batchellor notes (1 Laws of New Hampshire; *op. cit. supra*, note 5, p. 10) that the authorities are in disagreement whether these laws were not subsequently disallowed by the Committee of Lords for Trade and Plantations. At any rate the copy which he reproduces, from the English archives, bears marginal notations indicating disapproval of the provisions on the ground that the matters dealt with were "provided for" and hence that the provisions should be "set aside." No explanatory ruling has been found in connection with the action of the Crown, August 27, 1718, in repealing the New Hampshire treason act of May 15, 1714. See note 10, *supra*.

The Acts of attainder and partial pardon passed by the Virginia assembly in the session of February 1676-7 in consequence of Bacon's Rebellion were disapproved in general terms by the committee of the Privy Council because the narrowness of the pardon conflicted with the King's proclamation of amnesty and because the laws were deemed to exceed the legislative powers of the colonial government, and instructions to procure their repeal were, accordingly, given the new governor. Russell, *op. cit. supra*, pp. 29-30; 1 Labaree, *op. cit. supra*, 159. The data



*King v. Bayard*, a prosecution in New York in 1702 under the Act of 1691 just noted, is the only pre-Revolutionary case of which we have an extensive record. Though the issues centered on the interpretation of the New York act, which was not couched in familiar English statutory terms, the defense resorted to Coke and the principal English statutes to evolve a theory of restrictive construction of treason legislation.<sup>15</sup> Law libraries in the colonies were almost non-existent until the end of the 17th century, but from then until

is not explicit enough, perhaps, to count this as an example of royal check on colonial definition of the offense; it may, rather, constitute a curb on improper execution of the laws. Cf. note 27, *infra*.

The Trial of Nicholas Bayard for High Treason, New York City, 1702, 14 Howell's State Trials (London, 1812) 471, 478, 495, 499, 506, 10 Lawson, American State Trials (St. Louis, 1918) 548, 533, 535; Goebel and Naughton, Law Enforcement in Colonial New York (N. Y. 1944) xxiii, xxv. Though the record in Bayard's trial reflects familiarity with English trial procedure in treason cases, it may be suggestive of the limits of the material available that the able argument on the scope of the offense is drawn from English statutes and from Coke, without citation of reported decisions.

The best account of the history of treason prosecutions in a given colony is in Scott, *op. cit. supra*, note 5, pp. 154-171 (Virginia). Cf. Kilty, *op. cit. supra*, note 7, pp. 217-220 (Maryland). See also Chitwood, Justice in Colonial Virginia (Johns Hopkins Studies, Ser. XXIII, Nos. 7-8) 20-21; Chumbley, Colonial Justice in Virginia (Richmond, 1938) 71, 126; Records of the Particular Court of Connecticut (1639-1663) (Connecticut Historical Society, Hartford, 1928) 248; Hilkey, Legal Development in Colonial Massachusetts, 1630-1686 (N. Y. 1910) 97; Prince, An Examination of Peters's "Blue Laws" (1898) Ann. Rept. Am. Hist. Assn. 100-101.

the Revolution English treatises, statute books and Law Reports became more accessible, and it is reasonable to assume that leading lawyers of the period had opportunity, both in the legal education which some enjoyed in England, and in the books available in the colonies, to familiarize themselves with much that was written on the subject. The *Commonplace Book* of James Wilson (1767) contains quite extensive notes on the doctrines of the law of treason, obviously reflecting the use of the English lawbooks.<sup>18</sup>

All of this points to the fact that the several colonies drew on the general concepts of English law for the definition of treason and the incidents of its prosecution. The evidence is too scant, however, to justify any confident verdict as to how detailed was the knowledge of the mother country's law and experience in the matter; and it is consistent with the general history of the colonies' development to believe that local experience was [the most] substantial contributor to the attitudes of policy and the doctrines to be found here.

The striking characteristic of all of the pre-Revolutionary legislation in the colonies is the evident emphasis on the safety of the state or government, and the subordinate rôle of any concern

<sup>18</sup> Aumann, *The Changing American Legal System* (Columbus, 1940) Ch. III; Goebel and Naughton, *loc. cit. supra*, note 15; Hamlin, *Legal Education in Colonial New York* (N. Y. 1939) Ch. 5; cf., however, Morris, *Studies in the History of American Law* (N. Y. 1930) 44 ff., 67; Warren, *A History of the American Bar* (Boston, 1911) Ch. VIII. James Wilson's *Commonplace Book* was examined at the Pennsylvania Historical Society.

for the liberties of the individual. Whereas the outstanding feature of the treason clause placed in the Constitution of the United States is that it is on its face restrictive of the scope of the offense; the emphasis of colonial legislation is almost wholly affirmative. This is not surprising. Relatively weak and remote settlements, necessarily alert to the nearness of hostile empires and Indian tribes, would naturally think first in terms of positive defense against external enemies. The implications of the utility of the law of treason against domestic upset would also be mainly favorable to the official and landed or wealthy mercantile classes which dominated political affairs in the various colonies. Such laws as those passed at very early dates in the colonies north of Maryland would thus seem to have very practical explanations, and not to be designed merely to complete the logical symmetry of paper codes. The practical bases for the positive character of the colonial laws are further evidenced by the tendency for additional legislation to appear at the time of foreign wars or domestic disturbances.<sup>17</sup>

<sup>17</sup> For legislation reflecting tensions of the French and Indian Wars, see, in Connecticut—Acts and Laws (1743) (printed by Timothy Green. New London, 1743; reprinted, Hartford, 1918) 529; Maryland—Act of May, 25, 1705, Ch. V, and April 15, 1707, Ch. I, Laws of Maryland at Large, *op. cit. supra*, note 6; Massachusetts—Act of March 23, 1699–1700 (2d Sess., Ch. 21), and Acts of 1706, 1744, and 1755, 1 Acts and Resolves of the Province, *op. cit. supra*, note 9, pp. 401, 595, 3 *id.* 152, 814; New York—Act of December 23, 1755, 4 Colonial Laws, *op. cit. supra*, note 11, p. 8; Pennsylvania—Act of July 8, 1763, Ch. DL 6 Statutes at Large, *op. cit. supra*, note 11, p. 297; Virginia—April, 1757, Ch. II, 7 Henning, *op. cit. supra*, note 5, p. 87. Legislative reflec-

The best evidence that the prevailing policy was concern for the safety of the state or government and not the careful protection of the individual citizen is in the types of conduct which the statutes declared treasonable. It has been noted that broad authority to employ martial law against "insurrection", "rebellion", "mutiny" or "sedition" was commonly conferred in original charters or proprietary grants. The crime of

tions of domestic disturbances include, in Maryland—Ch. XXIV of the Session of April 6-29, 1650, Act of November 15, 1678, Ch. XVIII, *op. cit. supra*; New Jersey—Declaration of the Proprietors, December 6, 1672, Leaming and Spicer, *op. cit. supra*, note 5, p. 35. Laws passed in New Jersey, November 21, 1681, Par. XXI, *id.* 433, and Acts, 1703, Ch. III, in 1 Nevill, Acts of General Assembly of Province of New Jersey from 1703 to 1761 inclusive (Collected and published by order of the General Assembly. Printed by William Bradford, (n. p.), 1752); New York—Act of May 6, 1691, 1 Colonial Laws, *op. cit. supra*, note 11, p. 223, and Act of March 9, 1774, 5 *id.* 647, 654; North Carolina—Laws, 1711, Ch. I and Laws, 1715, Ch. XXXI, 25 State Records, *op. cit. supra*, note 11, p. 152, and 23 *id.* 38, 94, 332; Virginia—February 1676-7, Act I, 2 Hening, *op. cit. supra*, p. 366, and April, 1684, Act II, 3 *id.* 10. Legislation reflecting fundamental upheavals in the mother country includes Laws of Maryland at Large, *op. cit. supra*, Acts of June 3, 1715, Ch. XXX, and August 10, 1716, Ch. V; New Jersey—1 Nevill, *op. cit. supra*, Acts, 1722, Ch. XXXIII; New York—Act of September 21, 1744, 3 Colonial Laws, *op. cit. supra*, p. 424; Rhode Island—Acts 1756 and 1766 "for the more effectual securing to his Majesty the Allegiance of his Subjects," Acts and Laws (1767), *op. cit. supra*, note 11, p. 6. Not all of these laws define offenses as "treason," but such as do not do so, are sufficiently related to treason acts in the purpose of state security and severity of penalties to be relevant evidence of the prevailing climate of policy.

compassing the death of the king—a notable omission in the treason definition finally placed in the Constitution of the United States—was copied from the Statute of Edward III by Connecticut, Maryland, Massachusetts Bay, and New Hampshire; and was in effect adopted by the seven other colonies whose legislation recognized, in one form or another, the applicability of the English law of treason within their limits. Of course, it might be contended that since the basic English Statute of Edward III has been traditionally praised as setting limits to a dangerously vague common law of treason, the mere adoption of the English laws descending from this beneficent act showed a restrictive intent on the part of colonial legislatures. In view of the practical extension of the vague categories of the Statute of Edward III by the English courts, however, this argument seems somewhat artificial, especially as applied to governments which had reason to be keenly concerned for their safety from external foes. The only plausible reason for adopting English law offered by the statute books is the claim of the “common law” as the “birthright of English subjects” in the acts by which Delaware and Pennsylvania adopted the English statutes of treason.<sup>18</sup>

<sup>18</sup> See notes 6–11 *supra*, and also The General Laws and Liberties of Massachusetts Bay, Ch. XVIII, Sect. 20 (May, 1678). The Charters and General Laws, *op. cit. supra*, note 5; and, in North Carolina, Laws, 1711, Ch. I, 25 State Records, *op. cit. supra*, note 11, p. 152, and Laws, 1715, Ch. XXXI, 23 *id.* 38, 94, 332. The Delaware act is Laws, 1719, Ch. XXII. Laws of the State of Delaware, *op. cit. supra*, note 11; the Pennsylvania statute is Act of May

Maryland and Pennsylvania went further than other colonies and made it a state offense to compass the death of the proprietor. The Pennsylvania act, as was noted above, was repealed by the Queen in Council, for a reason which reflects a desire to curb the political pretensions of the colony rather than to guard the citizen's liberties. The earlier Maryland act does not seem to have come under the disapproval of the Crown; but it was in effect for but three years. Its passage seems indicative of a climate of policy, however.<sup>19</sup>

31, 1718, Ch. CCXXXVI, note 11, *supra*. Compare the remark of Chancellor Kilty, quoted note 26, *infra*, reflecting the common attitude after 1789.

<sup>19</sup> The Pennsylvania Act of November 27, 1700, Ch. XLVII, note 13, *supra*, enacted:

That if any person within this province or territories thereof shall compass, devise or endeavor the death, destruction or any bodily harm tending to the death or destruction, maim or wounding, imprisonment or restraint of the person of the proprietary and governor, in order to deprive or depose him of or from his government, or do stir up or assist any to invade this province or territories, such person being legally convicted thereof by the testimony of two or more credible witnesses proving the same, or by due course of law, shall forfeit half his estate real and personal, or suffer imprisonment during one whole year.

The alternative penalties seem oddly disproportionate, but the borrowing of the terms of the Statute Edward III regarding compassing, the reference to the security of the colony, the inclusion of a two-witness requirement, and the possible severity of the forfeiture make this in substance a treason act, though not expressly declared so. The act spells out forms of "compassing" which had to be devel-



The offense of levying war against the sovereign is given a broad definition in two ways in the colonial legislation. One of the major accomplishments of judicial construction of the Statute of Edward III in England was the eventual creation of the crime of treason by "constructive levying of war"; the concerted effort, by violence, to set aside the laws or the authority of the government or to accomplish objects of general public policy outside the established procedures of governmental action. This was not left wholly to judicial construction, however, in the several early colonial statutes which included in their condemnation of treason the offenses of "insurrection", "publick Rebellion", or of attempting "the Alteration and Subversion of our Frame of Government Fundamentally established by His Majesties Gracious Charter", as well as "rebellion against the person of the King, State or Commonwealth, either of England or these Colonies", the "Endeavour by force of arms or otherwise to disturbe the peace good and quiet of this their Majestyes Government as it is now Established", or the speaking or writing of words questioning the King's dominion.<sup>29</sup> It has been noted that the

oped by the constructions of the judges in England. *Quære*, does this imply a knowledge of the English doctrinal history? The Maryland Act of August 1, 1642, we have only in Chancellor Kilty's description (note 7, *supra*). It expressly copied the offense against the proprietor with enactment of the treasons defined by the Statute of Edward III.

<sup>29</sup>In addition to the legislation cited in notes 2-5, *supra*, see the Maryland Acts of May 25, 1705 and April 15, 1707, note 17, *supra*; The oath prescribed for the inhabitants of

New York Act of 1691 was repealed under instructions from the Crown, because its vague terms had been "misinterpreted" to the oppres-

the Kennebeck, note 5, *supra*; the New York Act of May 6, 1691, note 14, *supra*; in Virginia, Act I of the session of October 10, 1649, note 5, *supra*. Cf. Laws of Maryland at Large, *op. cit. supra*, note 6, Act of November 15, 1678, Ch. XVIII; 2 Statutes at Large of South Carolina (Edited by Thomas Cooper under Authority, Columbia, 1837), Act of December 22, 1690, No. 53, p. 44.

The unconventional terms of several other acts are worth noting. Among the Orders Made by the Court at Exeter [New Hampshire], previous to the Union with Massachusetts in 1643—i. e., in the period of town government prior to incorporation of the area into the Massachusetts colony—was that of February 9, 1640, 1 Laws of New Hampshire, *op. cit. supra*, note 5, p. 740, which provided:

That if any person or persons shall plot or practise either by combination or otherwise, the betrayinge of the contry or any principal part thereof into the hands of any foreign State, Spanish, Dutch or French, contrary to the allegiance we profess and owe to our dread sovereign lord King Charles his heirs and successors, it being his majesties pleasure to protect us his loyal subjects, shall be punished with death.

If any person or persons shall plot or practise treachery, treason, or rebellion, or shall revile his majesty the Lord's Anointed, contrary to the allegiance we profess and owe to our dread sovereign Lord King Charles his heirs and successors (ut *supra*) shall be punished with death.

Numb. 16

Exo. 22, 28.

1 Kings 2: 8, 9, 44.

Chapter XIV of the Concessions and Agreements of the Proprietors, Freeholders and Inhabitants of the Province

sion of the subjects; but even this unusual pronouncement in favor of the liberty of the citizen

of West New Jersey in America, March 3, 1676 (Leaming and Spicer, *op. cit. supra*, note 5) is perhaps the most unusual Act on domestic treason to be found in the colonies, creating a special offense on the part of members of the legislature. After reciting the obligation of the Assembly not to make laws contrary to fundamental rights defined in Chapter XIII, Chapter XIV declared:

But if it so happen that any Person or Persons of the said free Assembly, shall therein designedly, willfully, and maliciously; move or excite any to move, any Matter or Thing whatsoever, that contradicts or any ways Subverts, any Fundamentals of the said Laws in the Constitution of the Government of this Province, it being proved by seven honest and reputable Persons, he or they shall be proceeded against as Traitors to the said Government.

Among the Virginia laws of the session of April, 1684, Act II is reminiscent of English decisions which found a constructive levying of war in concerted plans to burn all brothels, destroy all dissenting chapels, and the like. Reciting that evilly disposed persons, about May 1, 1682 and thereafter, tumultuously and mutinously assembled to cut up and destroy all tobacco plants and with force and arms in a traitorous and rebellious manner entered the plantations of many good subjects for this purpose, "to the hazarding the subversion of the whole government, and ruine and destruction of his majesties good subjects", had not the authorities timely intervened so that some notorious actors had been convicted and executed, the Act declared its purpose to be to state the law

to the end and purpose, that none of his majesties subjects may be at any time hereafter seduced by the specious pretenses of any persons, that such tumultuous and mutinous assemblies, to cut up or destroy tobacco plants or any other the crop or labours of the inhabi-

was immediately balanced in the repealing statute's declaration that the laws of England

tants of the said collony, are but riots and trespasses \* \* \*

Accordingly, it provided:

That if any person or persons whatsoever, to the number of eight or above, being assembled together, shall at any time after the first day of June now next ensuing, intend, goe about, practice or put in use with force, unlawfully to cut, pull up or destroy any tobacco plants, either in beds or hills, growing within the said collony, or to destroy the same, either curing or cured, either before the same is in hogsheads or afterwards, or to pull downe, burne or destroy the houses or other places where any such tobacco shall be, or to pull downe the fences or enclosures of any tobacco plants, with intent to cut up or destroy the same, (and such person or persons being commanded or required in his majesties name by the governour or other commander in chief; or any one of the counsell, or one or more of the justices of the peace of the said collony, commanding and requiring such persons to disperse themselves, and peaceably to depart to their habitations) shall continue together by the space of four houres after such proclamation made, at or nigh the place where such persons shall be soe assembled; that then every such persons soe willingly assembled, in forceable manner, to doe any of the acts before mentioned and soe continuing together as aforesaid, and being thereof lawfully convicted, shall be deemed, declared and adjudged to be traytors, and shall suffer paines of death, and alsoe loose and forfeite as in cases of high treason.

The 1682 plant-cutting disturbances had arisen out of the effort of certain planters by this method to enforce crop restriction to cure the distress of low tobacco prices, after earlier attempts to restrict plantings by law had failed. Relying explicitly upon the English authority on construe-

"sufficiently provided" for the suppression of domestic treason.<sup>21</sup> Most of these acts broadly including domestic disturbance in the crime of treason antedate 1700, but there is no evidence that any were repealed or allowed to expire because they were believed to extend the scope of treason unduly. Moreover, during the 18th century all of the colonies which had passed such early, broad treason acts (except New Jersey), adopted or recognized the applicability of the

tive levying of war. Governor Culpeper caused several prosecutions for treason to be brought, as a result of which one person was acquitted and three convicted. Of the latter, one was reprieved because of his youth and the other two hanged and their estates seized. Thereafter the act of 1684 was passed, in order—as it declares—to remove the general impression that such disturbances were mere riots. There seem to have been no trials for treason under this act. See Scott, *op. cit. supra*, note 5, pp. 159-161.

Compare the usual provision of militia laws against seditious or mutinous conduct, of which the Massachusetts Act of March 23, 1699-1700 (2d Sess., Ch. 21) (1 Acts and Resolves of the Province, *op. cit. supra*, note 9) is typical:

That every person that shall be in his majestie's service, being mustered and in pay as an officer or souldier, who shall at any time during the continuance of this act excite, cause or joyn in any mutiny or sedition in the army, fortress or garrison whereto such officer or souldier belongs, or shall desert his majesty's service in the army, fortress or garrison, shall suffer death, or such other punishment as by a court martial shall be inflicted.

<sup>21</sup> See note 14, *supra*. Cf. Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay between 1761 and 1772, by Josiah Quincy, Jr. (Boston, 1865) 176, 221.

terms of the Statute of Edward III under which English courts were then reinforcing the concept of "constructive levying of war". Quincy (see footnote 21, *supra*) reports charges to the Grand Jury in 1765 and 1766 by the Chief Justice of the Province of Massachusetts Bay, in which the law is declared to be that:

Levying War against the King is High Treason; as where People set about redressing public Wrongs; this, Gentlemen, the Law calls levying War against the King; because it is going in direct Opposition to the King's Authority, who is the Redresser of all Wrongs.

The other respect in which the first colonial legislation expanded the offense of levying war was by including conspiracy to levy war. The English courts had early ruled that such conspiracy did not come within the Statute of Edward III. Again, the American legislation antedates 1700.<sup>22</sup> But, again, it must be pointed out that during the 18th century all of these jurisdictions (except New Jersey) together with others, either copied the terms of the Statute of Edward III into their books, or recognized the applicability of English treason law within their boundaries, including the offense of compassing the king's death, which by now had been construed by the English courts in effect to cover conspiracy to

<sup>22</sup> Legislation cited in notes 2-5, *supra*; the Maryland Acts of May 25, 1705 and April 15, 1707, note 17, *supra*; the Exeter Order of February 9, 1640, note 20, *supra*; the New York Act of May 6, 1691, note 14, *supra*; the Pennsylvania Act of November 27, 1700, note 19, *supra*.



levy war.<sup>23</sup> It would be artificial to hold that these colonies thereby consciously adopted all of the constructions of the king's courts; but it is equally true that this record cannot be taken to evidence an intent to narrow the scope of the offense.

Certain colonial statutes of the French and Indian Wars, following English models, suggest an extension of the bounds of the offense of adhering to the enemy, and have special interest, because they foreshadow legislation of the same type in the Revolutionary period. The Massachusetts Bay Act of August 31, 1706, "For preventing all traitorous correspondence with the French king, or his subjects, or the Indian enemy or rebels, and supplying them with warlike or other stores," declared it high treason to furnish provisions to the enemy, and also made it treason

\* \* \* if \* \* \* any person or persons shall, during the continuance of the present war with France, be convicted of holding a traitorous correspondence with any of her majesty's enemies, by letters or otherwise, whereby they shall give them intelligence tending to the damage of her majesty's subjects or interests, or to the benefit or advantage of the enemy. \* \* \*

It was likewise declared high treason

\* \* \* if any of her majesty's subjects within this province shall \* \* \* during the continuance of the present war with France, without license from her majesty's governour or commander-in-chief of this her majesty's province for the time

<sup>23</sup> 8 Holdsworth, *History of English Law* (2d ed. London, 1937) 313, 314, 318.

being, by and with the advice and consent of the council, voluntarily go, repair or embarque in or upon any vessel or vessels, with an intention to go into, reside or inhabit in any of the dominions or territories of the said French king, or amongst any of the Indian enemy or rebels ~~of~~ afore-said \* \* \*

The Act contained a proviso:

That nothing in this act contained shall be construed, intended, deemed or taken to extend to bar the necessary relief and supply of any French prisoners of war, or of any flagg of truce, or to the supply of the English prisoners in French or Indian hands; or for secret services made or done, at all times, by the direction of the governour, with the advice of the council; or to bar a present charitable relief to any of the enemy that by adversity may be cast on shoar upon this coast, for the necessary preservation of life; intelligence thereof to be forthwith despatch'd to the governour.<sup>24</sup>

The broad terms of this statute raise the interesting question, whether under it, a specific intent to betray the colony must be shown to convict. This is the implication, *prima facie*, of the prohibition of "traiterous" correspondence, but the adjective might also be taken to be adequately explained by what follows; and the remainder of the provision in terms condemns a correspondence which in fact conveys information tending to damage the colony or benefit the enemy, without mention of an intent thereby to betray the colony.

<sup>24</sup> 1 Acts and Resolves of the Province, *op. cit. supra*, note 9, p. 595; 3 *id.* 152.

The terms of the next section, regarding unlicensed departure for enemy territory, include no innuendo of a showing of specific intent thereby to give aid or comfort to the enemy; an unlicensed departure on private business for profit or to go to family or friends would seem within the ban. Where the penalty of death and forfeiture of property is involved, a court would normally rule as a matter of course that a guilty mind was intended to be an element of the offense; but this argument here begs the question, which is whether in view of the likelihood of peril to the state, the guilty mind does not consist in the intention which puts the actor in so ambiguous a situation, regardless of any further showing of a specific motive to betray. That the act was intended to be taken in a broad sense, is suggested by the proviso, which excludes matters which it would otherwise seem needless to mention. Perhaps the strongest argument against the broad interpretation is that the offense of "traiterous correspondence" is linked in the act with that of selling or delivering provisions to the enemy, an offense which in wartime can hardly be treated as open to innocent explanation.

A: Act of substantially similar terms was passed June 26, 1744, in the same colony (see footnote 24, *supra*). These should be compared with the series of statutes beginning with the Act of March 29, 1755, which forbade citizens of the province "to hold any correspondence or communication with any inhabitants of Louisburgh or any other of the French settlements in North America, either by land or water", and penalized violation by forfeiture of vessel and cargo, and,

for the vessel's master, loss of one ear and 39 lashes and deprivation of the right to hold any office of trust or honor under the province. Since the preamble recited that the statute was designed to prevent knowledge of gathering plans against Louisburgh from reaching the French, it seems particularly likely that its sweeping prohibition was meant to be taken without the requirement of showing a specific intent to betray.<sup>23</sup>

If the colonial legislation thus shows an almost unbroken trend to put the interest in community security first in defining the types of conduct which shall be deemed treasonable, it is equally true, however, that it displays a persistent concern for safeguarding the individual regarding the quantum of proof and the decencies of procedure. Certain early statutes required at least two witnesses to prove any capital offense. From the latter part of the 17th century on, in most of the colonies the two-witness requirement and the procedural guaranties laid down by the Statute of 7 William III in treason trials were expressly enacted by reference to that statute or to the English statutes on treason generally.<sup>24</sup> The wit-

<sup>23</sup> 3 *id.* 814; cf. Act of June 14, 1755 (1st Sess., Ch. 6), *id.* 865, and Act of February 25, 1757 (7th Sess., Ch. 25), *id.* 1027.

<sup>24</sup> The earliest act requiring two or more witnesses for capital offenses in general seems to be Laws of New Haven Colony, *op. cit. supra*, note 2, p. \*17:

That no man shall be put to death, for any offence, or misdemeanour in any case, without the testimony of two witnesses at least, or that which is Equivalent thereunto, provided, and to prevent, or suppress much inconvenience, which may grow, either to the publick, or to particular Persons, by a mistake herein, it is

ness requirement of course meant simply a requirement of two witnesses without the specification laid down subsequently in the United States Constitution, that they be to the same overt act. On the other hand, pursuant to the statute of William III, they must be witnesses to the same

---

Ordered, and declared, by the Authority aforesaid, that two, or three single witnesses, being of competent age, of sound understanding, and of good Reputation, and witnessing to the case in question (whither it concerne the publick peace, and welfare, or any one, and the same particular person) shall be accounted (the party concerned, having no just exception against them) sufficient proofe, though they did not together see, or heare, and so witnesse to the same individuall, any particular Act, in reference to those circumstances of time, and place.

None of the General Laws of Connecticut, however, adopted this provision. Chapter I, "The Generall Fundamentals", of The General Laws and Liberties of New Plimouth Colony, 1671 (The Compact with the Charter and Laws, *op. cit. supra*, note 4, p. 242), provided

6. That no Man be Sentenced to Death without Testimonies of two witnesses at least, or that which is equivalent thereunto, and that two or three Witnesses being of competent Age, Understanding and of good Reputation, Testifying to the case in question, shall be accounted and accepted as Full Testimony in any case, though they did not together see or hear, and so Witness to the same individual Act, in reference to circumstances of time and place; Provided the Bench and Jury be satisfied with such Testimony.

In New Jersey, the Act of May 30, 1668 (Laws in Carteret's Time, from 1664 to 1682, Leaming and Spicer, *op. cit. supra*, note 5, p. 84), stated that

Concerning taking away of a Man's Life, It is Enacted \* \* \* that no Man's Life shall be taken

treasonable offense, and one witness to each of two separate, or at least different types, of treason, would not suffice.

away under any Pretence but by Virtue of some Law established in this Province, that it be proved by this Mouth of two or three sufficient Witnesses.

A similar declaration regarding all crimes was contained in Ch. XX of the Concessions and Agreements of the Proprietors, etc., March 3, 1676, cited note 20, *supra*.

Statutes providing generally for conviction of treason of persons "provably attainted of open deed upon the testimony of two lawful and credible witnesses upon oath", or expressly providing that trials in treason cases should be regulated according to the Act of 7 William III, are cited in notes 8-11, *supra*. And see Pennsylvania Act of November 27, 1700, note 19, *supra*. Chancellor Kilty, *op. cit. supra*, note 7, pp. 217-220, notes, regarding indictments brought in Maryland in 1706 and 1707 for feloniously and traitorously receiving one Richard Clarke, outlawed on a charge of conspiracy to overthrow the government, that

\* \* \* the record in the first [case] states, that the prisoner (when brought to be tried) had, before that time, had a copy of the indictment, and a copy of a panel of jurors delivered to him, according to the form of the statute. This was the statute 7 W. 3, Ch. 3, and in the last case the prisoner declared, that he was ready; that he wanted no process for witnesses, &c., that he released, or rather declared, that he had a copy of the indictment and panel, and forewent any advantage for the trial before due time fixed by the statute 7 king William for regulating trials in high treason, and on misprision of treason. That statute having been thus recognized furnishes strong evidence if it were necessary that the one now under consideration [25 Edw. III, Stat. 5] was in part adopted also, being essential to the safety of the inhabitants, as defining what offenses only should be treason.



The records of prosecutions or decisions in treason cases in the colonial period are too scanty to be of much help in seeing the trend of policy. In particular, nothing helpful has been found to illuminate the borderline cases of adherence to the enemy. Almost all the cases which had sufficient color and interest to cause the preservation of some record were cases of domestic insurrection—"constructive levying of war". Where political difference rose to the degree of armed resistance that it did in Bacon's Rebellion, in Virginia, in 1675-6, there was clearly treason, if domestic disturbance were to be recognized as within the offense at all; the question of a wise executive clemency in the case is something again.<sup>27</sup> On the other hand, there is evidence that there were cases of abuse by prosecutions for political differences which should not have been deemed to carry such a threat of subversion of the state as to be treasonable. Such a case seems the celebrated *King v. Bayard*, in New York in 1702.<sup>28</sup> But there is a total lack of any specific evidence to show that

<sup>27</sup> Note 14, *supra*, and Scott, *op. cit. supra*, note 5, pp. 156-159. See 1 Morison and Commager, *The Growth of the American Republic* (N. Y. 1942) 80: "Berkeley rounded up the leaders and had thirty-seven of them executed for treason. 'That old fool has hanged more men in that naked country than I have done for the murder of my father,' exclaimed Charles II."

<sup>28</sup> Note 15, *supra*. Executive action against persons guilty of what amounted probably to "constructive levying of war" is reflected in Chapter XXIV of the Laws of the Maryland General Assembly of April 6-29, 1650, *Laws of Maryland at Large, op. cit. supra*, note 6 and in Kilty's account of the prosecutions of 1706 and 1707, note 26, *supra*; in New Jersey, by the Declaration of the Proprie-

such incidents were sufficiently numerous or outrageous as to form a current of opinion that the scope of treason must be narrowed for the safety of the citizen. None of the restrictive arguments urged at the time of the drafting and ratification of the Federal Constitution has been found which is based on an appeal to American colonial experience in this regard.

(b) *The Revolution: 1775-1783*

As a matter of law, the Revolution called for new legislation on treason, for new political entities had arisen to claim allegiance, betrayal of which was treason.<sup>29</sup> As a matter of fact, the dangers from disaffected persons in the colonies, and in the new states, were so clear and pressing as naturally to produce legislative reactions. Scattering provisions in the new state constitutions banned legislative attainders, abolished corruption of blood as a penalty, limited the pardoning power of the executive, or required trial in the county where the offense was committed; but none spoke of the scope of the offense or the nature of its

tors, December 6, 1672, III (Leaming and Spicer, *op cit. supra*, note 5, p. 35), paragraph XXXVII of the Acts in Assembly of November 5, 1675 (Laws in Carteret's Time, *id.*), paragraph XXI of the Acts and Laws of the Assembly of November 21, 1681 (Laws Passed in West-Jersey, *id.*), and the Laws, 1703, Ch. III (1 Nevill, *op. cit. supra*, note 17), and in New York, in addition to the Act of May 6, 1691, by the Act of March 9, 1774 (5 Colonial Laws, *op. cit. supra*, note 5, pp. 643, 654).

<sup>29</sup> Cf. Kent, Ch. J., in *Jackson v. Catlin*, 2 Johns (N. Y.) 248, 260 (1807); see note 66, *infra*.

proof. New statutes in most states undertook to define the offense and prescribe for proof and trial procedure; and about this nucleus clustered other legislation, sometimes elaborating the scope of the crime, sometimes creating ancillary offenses—disloyal utterances, traffic with the enemy, confiscation of property of disaffected persons—which help indicate the views of policy with which the offense was approached. Summary executive action amounting to less than the full penalty for treason finds frequent reflection in the histories of the times; but, as in the earlier period, records of trials for treason are scant and do not contribute as much as the statutory material to outlining the attitudes taken towards the crime.<sup>30</sup>

The Revolution does not break the thread of continuity with traditional English materials defining the scope of treason. When the Continental Congress, on June 24, 1776, adopting the recommendation of its "Committee on Spies", recommended to

<sup>30</sup> As to the reality of the danger from disaffected persons, see Paltsits, *Minutes of the Commissioners for detecting and defeating Conspiracies in the State of New York, 1778-1781* (3 vol. Albany 1909), *passim*. That the reason for the paucity of civil trials for treason was not any lack of a problem, but rather the resort to summary administrative or court martial handling of cases, see Paltsits, *supra*, *passim*, and Van Tyne, *The Loyalists in the American Revolution* (N. Y. 1929), 271, 272. Further examples will be found in Davis, *The Confiscation of John Chandler's Estate* (Boston, 1903), Ch. III; De Mond, *The Loyalists in North Carolina During the Revolution* (Durham, 1940), *passim*; Harrell, *Loyalism in Virginia* (Durham, 1926), *passim*; Nye, ed., *Sequestration, Confiscation and Sale of Estates, 6 State Papers of Vermont* (n. p. 1941), *passim*.

the colonies that they pass treason legislation, it used the familiar terms of the Statute of Edward III, with a suggestion of the evidentiary requirements of the Statute of 7 William III:

*Resolved*, That all persons abiding within any of the United Colonies, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of such colony; and that all persons passing through, visiting, or make [sic] a temporary stay in any of the said colonies, being entitled to the protection of the laws during the time of such passage, visitation, or temporary stay, owe, during the same time, allegiance thereto:

That all persons, members of, or owing allegiance to any of the United Colonies, as before described, who shall levy war against any of the said colonies within the same, or be adherent to the king of Great Britain, or others the enemies of the said colonies, or any of them, within the same, giving to him or them aid and comfort, are guilty of treason against such colony:

That it be recommended to the legislatures of the several United Colonies, to pass laws for punishing, in such manner as to them shall seem fit, such persons before described, as shall be proveably attainted of open deed, by people of their condition, of any of the treasons before described.<sup>35</sup>

<sup>35</sup> 5 Journals of the Continental Congress (Government Printing Office, Washington, 1929) 475; Force, *American Archives* (Washington, 1846), 4th Ser., v. VI, p. 1720. The composition of the committee which recommended the resolutions is stated in C. F. Adams, *Life of John Adams*, 4 Works of John Adams (Boston, 1856) 224-225.

The committee which had recommended the resolutions included John Adams, Thomas Jefferson, John Rutledge, James Wilson and Robert Livingston. The familiar words of the resolutions apart, it would be incredible that this distinguished group of lawyers and students of the law did not draft their suggestions with a background of English law in mind, and at least in the case of Jefferson and Wilson we know that they had previous familiarity with English materials. In the course of the next year, the advice of the Continental Congress was taken by most of the states, which adopted basic statutes employing the recommended formula. In the minority states which anticipated the Congressional suggestion, or thereafter adopted substantially differing legislation, the key definition of the offense was still in terms similar to the Statute of Edward III.

<sup>12</sup> See "Instructions for the Deputies appointed to meet in General Congress on the part of this Colony", August, 1774, 1 *The Writings of Thomas Jefferson* (Library ed., Washington, 1903) 13, 211, 215; James Wilson's *Common-place Book* (1767), note 16, *supra*.

<sup>13</sup> The following states substantially adopted the Congress' recommendation, Delaware: Act of February 22, 1777 (General Assembly session of October 28, 1776, Ch. LXXXVIII; p. 359), bound with *Laws of the Government of New-Castle, Kent and Sussex upon Delaware* (Printed by James Adams, Wilmington, 1763) (see Act of June 26, 1778, p. 41; the 1777 Act was limited by its terms to the duration of the present war, and was apparently allowed to lapse, leaving in effect the general adoption of the English law by Delaware Laws, 1779, Ch. XXII (note 11, *supra*), limited by Delaware Constitution, 1792, Art. V, Sect. 4; copied from the provision of the United States

Moreover, the terms of subsidiary legislation punishing disloyal utterances, sometimes as treason, sometimes as lesser offenses, suggest analogies

Constitution. See 2 Laws of the State of Delaware, *op. cit. supra*, note 11, p. 595. Massachusetts: Act of February 1, 1777 (3d Sess., Ch. 32), 5 Acts and Resolves of the Province, *op. cit. supra*, note 9, p. 615. New Hampshire: Act of January 17, 1777; Acts and Laws (1776-80) of the State of New Hampshire in America. (By order of the General Assembly. Exeter, 1780). New Jersey: Act of October 4, 1776 (1776, Ch. V), Acts of Council and Assembly (1776-83), from establishment of present government to Dec. 24, 1783. (By Peter Wilson, compiler. By authority. Trenton, 1784). New York: Resolution of the Convention of Representatives of the State of New York, July 16, 1776, Force, American Archives, *op. cit. supra*, note 31, 5th Ser., v. I, pp. 446-447. North Carolina: Ordinance of December 23, 1776 (Ordinances of Convention—1776), 23 State Records, *op. cit. supra*, note 11, p. 997; see also Laws, 1777. (1st Sess.) Ch. III, and Laws, 1777 (2d Sess.), Ch. VI, 24 *id.* 9, 84. Pennsylvania: Act of September 5, 1776, Ch. DCCXXXII, 9 Statutes at Large, *op. cit. supra*, note 11, p. 18; see Act of February 11, 1777, Ch. DCCXI, *id.* 45. Rhode Island: Acts, May, 1777, (2d Sess.), p. 30. Though not copying the full form of the act recommended by Congress, Chapter III of the Virginia statutes, October, 1776 (9 Hening, *op. cit. supra*, note 11, p. 168), should be counted among the acts stemming from the Congressional advice, since we know that Thomas Jefferson, at least participated in the writing of the act after he had left the Continental Congress to take his seat in the Virginia House of Delegates. The index of the Clerk of the House of Delegates, for the Journal for 1776 notes, under date of October 28, 1776, "TREASON/ Leave for bill Declaring what shall be treason, with resolutions of General Congress. Referred to a committee (Messrs. Bullitt, Griffin, Lee, Curle, Henry, and Jefferson) to prepare." (Reference through the courtesy of Mr. William J. Van Schreeven, Head Archivist,



in test oath provisions which the colonial laws had adopted from England.<sup>34</sup> The few treason

Virginia State Library, Richmond). See J. Randall, *Life of Jefferson* (N. Y.: 1858) 203, 205; Kean, *Thomas Jefferson As A Legislator* (1887) 11 *Vs. Law Jour.* 705, 714.

Statutes differing in greater degree from the recommendation of the Continental Congress, whether or not antedating that suggestion, are the Connecticut Act of October, 1776 in *Acts and Laws* (1784) (Printed by Timothy Green, New London, 1784) 25; *cf.* *Acts and Laws*, 1781, *id.* 569. Maryland: Act of April 20, 1777 (Feb. 1777 Sess.), Ch. XX, in 1 *The Laws of Maryland* (Revised and Collected under Authority of the Legislature by William Kilty) (Annapolis, 1799 and 1800). South Carolina: Act of April 11, 1776, No. 1017, 4 *Statutes at Large*, *op. cit. supra*, note 20, p. 343. Compare Vermont, *Acts and Laws*, 1779, p. 6. Georgia does not appear to have enacted any general treason act, though numerous separate acts of attainder were passed. See 19 *Colonial Records of the State of Georgia* (Atlanta, 1911), Part II, p. 673; *cf.* *Digest of the Laws of the State of Georgia* (1755-1800) (Marbury and Crawford, Savannah, 1802) 62, 111.

Force, *American Archives*, *op. cit. supra*, note 31, gives data regarding several of the state acts: 4th Ser., vol. V, 1604 (Connecticut), VI, 1500 (Maryland), VI, 1648 and 5th Ser., I, 412 (New Jersey); 5th Ser., vol. I, 446 (New York), 549 (Rhode Island) and 1210 (Pennsylvania).

Lists of test oath laws and of the "principal" laws directed against the Loyalists in the American Revolution are contained in Van Tyne, *The Loyalists in the American Revolution* (N. Y.: 1929) App. B and C, pp. 318, 327.

<sup>34</sup>Compare, e. g., New York Act of September 21, 1744, 3 *Colonial Laws*, *op. cit. supra*, note 5, p. 424, and Rhode Island, *Acts*, 1756, 1766, in *Acts and Laws* (1767), *op. cit. supra*, note 11, p. 6, with Massachusetts, Act of May 1, 1776 (4th Sess., Ch. 21), 5 *Acts and Resolves of the Province*, *op. cit. supra*, note 9, p. 479; New York Act of March 30, 1781 (4th Sess., Ch. XLVIII), in *Laws of the State of*

cases of the period, reported in the volumes of Dallas show counsel to be familiar with the basic English statutes and treatises; but it may be significant of the limitations of local law libraries that in his argument in *Respublica v. Carlisle*, in 1778, the Attorney General of Pennsylvania cites Lord Preston's case from Foster's treatise and not from the reports. Similarly, Chief Justice McKean's notes of the argument made by James Wilson for the defense in the *Carlisle* case show Wilson as relying on the English statutes and treatises, with no mention of any citation to the reports.<sup>30</sup> But, if American lawyers and statesmen did not have the detailed development of English judge-made law at their finger tips, the evidence and the probabilities clearly establish that they drew their ideas of the scope of the offense and the nature of proceedings therein from important English materials.

Continuity with the colonial period also marks the time of the Revolution with respect to the definition of the scope of the offense. The strug-

New York. (Printed by John Holt. Poughkeepsie, 1782) 189; Rhode Island, Acts, July, 1776, p. 133.

<sup>30</sup> See notes of arguments in *Respublica v. Malin*, 4 Dallas 33 (Pa. Ct. of Over & Terminer, 1778); *Respublica v. Carlisle*, *id.* 34, 36; *Respublica v. Roberts*, *id.* 39. In the "Notes of C. J. McKean in case of Ab'm Carlisle, 1778", 7 Pennsylvania Archives (Hazard, ed. Philadelphia, 1853) 44-52, Wilson cites Blackstone, Hale, and Hawkins, and the statutes of 25 Edw. III; 1 Edw. VI, 1 & 2 Ph. & M., Ch. 40, 7 Wm. III, Ch. 3, and 7 Anne Ch. 21. Hazard states (*op. cit. supra*, 52, note), that Mr. Chief Justice McKean's notes on the arguments in the Roberts case could not be found.

gle with Great Britain was bitterly fought and the outcome long in doubt, with neighbor divided from neighbor and suspicion prevalent. In this atmosphere, it was to be expected that the dominant emphasis, as in the preceding period, would be on the security of the state, rather than the liberty of the individual.

However, the break with England itself produced the first manifest distrust of the abuse of treason trials, and the Revolutionary years show the definite beginnings of the wary policy which was to find expression in the Federal Constitution. In his draft of "Instructions for the Deputies appointed to meet in General Congress on the part of this Colony" (August, 1774), Thomas Jefferson raised the issue of the definition of "treason". Noting General Gage's proclamation, in Massachusetts, declaring it treason for the inhabitants to assemble to consider grievances and to form associations in this connection, Mr. Jefferson argued that:

If he considers himself as acting in the character of his Majesty's representative, we would remind him that the statute 25th, Edward the Third has expressed and defined all treasonable offences, and that the legislature of Great Britain had declared, that no offence shall be construed to be treason, but such as is pointed out by that statute, and that this was done to take out of the hands of tyrannical Kings, and of weak and wicked Ministers, that deadly weapon, which constructive treason had furnished them with, and which had drawn

the blood of the best and honestest men in the kingdom. \* \* \* 36

The burden of complaint with regard to the law of treason, so far as the great public debate was concerned, related, however, to an important matter of procedure. Among the grievances recited by the Continental Congress in the preamble to its resolutions declaring the rights of the colonies, adopted October 14, 1774, was the fact that:

\* \* \* it has lately been resolved in Parliament, that by force of a statute, made in the thirty-fifth year of the reign of king Henry the eighth, colonists may be trans-

<sup>36</sup> 1 Writings, *op. cit. supra*, note 32, pp. 241, 215. As Secretary of State, in his letter of April 24, 1792, to Messrs. Carmichael and Short, giving instructions regarding negotiations with Spain, Jefferson explained why this country would not wish to agree to surrender political refugees:

Treason, \* \* \* when real, merits the highest punishment. But most codes extend their definitions of treason to acts not really against one's country. They do not distinguish between acts against the *government*, and acts against the *oppressions of the government*; the latter are virtues; yet they have furnished more victims to the executioner than the former; real treasons are rare; oppressions frequent. The unsuccessful strugglers against tyranny, have been the chief martyrs of treason laws in all countries. \* \* \*

8 *id.* 332; compare the Notes on Virginia (1782), 2 *id.* 216. Writings, *op. cit. supra*. With his disappointment at the failure to convict Burr fresh in mind, President Jefferson emphasized the need for re-examining the adequacy of the extent of the offense rather than its limitations, in his Seventh Annual Message (1807), 3 *id.* 451-452.

ported to England, and tried there upon accusations for treasons, and misprisions, or concealments of treasons committed in the colonies; and by a late statute, such trials have been directed in cases therein mentioned.<sup>37</sup>

Abuse of treason trials was not listed, in explicit terms, by the Declaration of Independence among its charges of oppressive conduct; but both the scope of prosecutions threatened and the unfairness of trials in remote England seem to be protested in the complaint "For transporting us beyond seas to be tried for pretended offences: \* \* \* 38

As has been seen, Jefferson participated in drafting both the treason act which the Congress recommended to the colonies on June 24, 1776, and the Virginia treason statute of October, 1776. There seems to be no record of the policy deliberations of the draftsmen of these measures. It was pointed out in the analysis of the colonial legislation, that the mere use of the terms of the Statute of Edward III is ambiguous on the issue of exten-

<sup>37</sup> 1 Journals, *op. cit. supra*, note 31, p. 63, 65. See the more elaborate statement of this complaint in the "propositions offered by J. Duane, to the Committee for stating Rights, Grievances and the Means of Redress. In Congress at Philadelphia, between 7th and 22d September, 1774", 1 Burnett, ed., Letters of Members of the Continental Congress (Washington, 1921) 43, 44, n. 36.

<sup>38</sup> This was a highly practical point in the fears and resentments of colonial leaders. See Joseph Hewes to James Iredell, Philadelphia, 31st Oct. 1774, 1 Burnett, *op. cit. supra*, note 37, p. 83; 1 Van Tyne, The Founding of the American Republic (Boston, 1922) 301-305.

sive versus restrictive intent.<sup>37</sup> The situation may now, however, be altered, since, as Jefferson's essay of 1774 shows, there was now a political reason to emphasize the tradition which makes the Statute of Edward a restrictive act. Moreover, the new American treason acts included no provision analogous to that of compassing the king's death. This omission was of course logically explainable on the ground that in a republic there was no proper place for an analogous offense, that the state alone, and not the head of the state, was to be given the protection of this dread penalty, and that it was adequately protected by the provisions against levying war or adhering to enemies. There seems to be no contemporary exposition of this theory, however, and its logic is a bit too pat to seem a convincing explanation of the rather haphazard processes of state legislation of that day.<sup>38</sup> It is altogether likely that in most states, the offense of compassing the death of the king was dropped for no more elaborate reason than that there was no longer a king. On the other hand, one cannot make such assumptions about legislation in the drawing of which Thomas Jefferson had a hand. We may draw some further light from the notes which Jefferson wrote to Chancellor Wythe, November 1, 1778, regarding Jefferson's proposed "bill for proportioning Crimes and Punishments, in cases heretofore Cap-

<sup>37</sup> Note 18, *supra*.

<sup>38</sup> Substantially the argument outlined is offered in 2 Swift, A System of the Laws of the State of Connecticut (Windham, 1796), 297; Rawle, A View of the Constitution of the United States (2d ed. Philadelphia, 1829) 141.



ital." Jefferson proposed a section providing [footnotes are his]:

<sup>2</sup> If a man do levy war<sup>3</sup> against the Commonwealth [*in the same*], or be adherent to the enemies of the Commonwealth [*within the same*]<sup>4</sup>, giving to them aid or comfort in the Commonwealth, or elsewhere, and thereof be convicted of open deed, by the evidence of two sufficient witnesses, or his own voluntary confession, the said cases, and no<sup>5</sup> others, shall be adjudged treasons which extend to the Commonwealth, and the person so convicted shall suffer death, by hanging, and shall forfeit his lands and goods to the Commonwealth.

In his footnotes, Jefferson explained the policies behind his draftsmanship:

<sup>2</sup> 25 E. 3. st. 5 c. 2. 7. W. 3. c. 3 §2.

<sup>3</sup> Though the crime of an accomplice in treason is not here described, yet, Lord Coke says, the partaking and maintaining a treason herein described, makes him a principal in that treason; it being a rule that in treason all are principals. 3 Inst. 138. 2 Inst. 590. 1 H. 6.5.

<sup>4</sup> These words in the English statute narrow its operation. A man adhering to the enemies of the Commonwealth, in a foreign country, would certainly not be guilty of treason with us, if these words be retained. The convictions of treason of that kind in England have been under that branch of the statute which makes the compassing the king's death treason. Foster 196, 197. But as we omit that branch, we must by other means reach this flagrant case.

<sup>5</sup> The stat. 25 E. 3. directs all other cases of treasons to await the opinion of Parlia-

ment. This has the effect of negative words, excluding all other treasons. As we drop that part of the statute, we must, by negative words, prevent an inundation of common law treasons. I strike out the word 'it', therefore, and insert 'the said cases, and no others.' Quaere, how far those negative words may affect the case of accomplices above mentioned? Though if their case was within the statute, so as that it needed not await the opinion of Parliament, it should seem to be also within our act, so as not to be ousted by the negative words.<sup>41</sup>

From this it appears that Jefferson was alert to the fact that the law of "constructive treasons" had grown in important cases under the "compassing" phraseology which the American acts had omitted; and that in his eyes it was not the clauses stating particular types of treasonable conduct, so much as the provision requiring Parliamentary action on novel cases, that gave the Statute of Edward III its restrictive character. Foreshadowing his later distrust of judicial law-making, Jefferson sees the need of new limiting language, if there are not to be new "common law", i. e., judge-made treasons. Plainly, in 1778 he favors a general policy of limiting the scope of the offense. On the other hand, like the draftsmen of the Federal Constitution, he wished the law to give firm protection to the state within the area

<sup>41</sup> Writings, *op. cit. supra*, note 32, pp. 216, 218, 220-221. Jefferson's proposed revision of the criminal code failed of enactment by one vote in 1785; legislation of similar type was finally obtained in 1796. *Id.*, 257. See Kean, *op. cit. supra*, note 33, p. 714.

embraced by the definition: hence his extended definition of "adhering to the enemy". And his analysis of the liability of accomplices introduces a most important limitation on his general restrictive approach, for he is apparently ready to accept the words of 25 Edward III Ch. 2 plus at least some of the gloss put upon them by the English judges. In the letter transmitting his draft bill on punishments to Chancellor Wyethe, Jefferson explained his general approach in this regard:

In its style, I have aimed at accuracy, brevity, and simplicity, preserving, however, the very words of the established law, wherever their meaning had been sanctioned by judicial decisions, or rendered technical by usage \* \* \*. And I must pray you to be as watchful over what I have not said, as what is said; for the omissions of this bill have all their positive meaning. I have thought it better to drop, in silence, the laws we mean to discontinue, and let them be swept away by the general negative words of this, than to detail them in clauses of express repeal \* \* \*.

This is a natural inclination in a professional draftsman, using words of art; but it obviously makes possible considerable nullification of the policy of limiting the bounds of the crime.

Whether or not, his ideas directly or indirectly reached any of the framers at Philadelphia, the

<sup>40</sup> 1 Writings, *op. cit. supra*, note 32, p. 216. In the "Note" which Jefferson later wrote on his achievements in the legislature, he commented, regarding his proposed revision of the criminal code, that "The text \* \* \* had been studiously drawn in the technical terms of the law, so as to give no occasion for new questions by new expressions." *Id.* 257.

trend of Jefferson's thought so plainly resembles that of the restrictive clause inserted in the Federal Constitution as to suggest a kind of thinking which must have been in the air for some time before 1787. But the Revolutionary period gives us more direct testimony on this point, from one of the men who drew the constitutional provision. In 1778, in Philadelphia, spurred by the indignation of patriots, the commonwealth prosecuted for treason several persons who had had various relations with the British during their occupation of that city. James Wilson, leading figure on the American side, was also a leader of the bar, and, moreover, a fundamentally conservative man not in sympathy with the more radical and vociferous wing of the patriotic movement. The accused had been men of some standing, and much contemporary, as well as subsequent, opinion was that they were handled with unjust severity. There is, therefore, room to believe that, as one of the defense counsel in this group of cases, Wilson spoke with more than mere advocate's zeal. Like Jefferson, he now saw a restrictive policy to be deduced from the Statute of Edward III. According to the notes of his argument in *Respublica v. Carlisle*, taken by Mr. Chief Justice McKean, Wilson contended:

Treason at common law indefinite & not ascertained, 1 Hawk. fo. 34; 4 Blackstone pa. 75; 1 Hale fo. 81. By 25<sup>th</sup> Edw. 3, c. 2, it is ascertained and fixed; the Parliament who enacted this act are called the *Benedictum Parliamentum*, the only one ever since in England, except that by the 7<sup>th</sup> William, the prosecution must be within 3 years \* \* \*

And the Chief Justice notes the following brisk exchange between prosecution and defense:

Mr. Serjeant, Attorney General, What was treason at common law, the arbitrary proceedings in arbitrary reigns, are nothing to the present question.

4. Blackstone, 352 & 3; Laws of Pennsylvania very different & more beneficial. \* \* \*

Replication by Mr. Wilson:

If the Statutes are not extended here, we shall be all afloat as if we were before the 25<sup>th</sup> Edw<sup>d</sup> 3, ch. 3.<sup>42</sup>

None of the decisions in the Pennsylvania treason trials mounted to the level of a legal classic, but the opinions are marked with judicial restraint and it appears that the court was careful of the rights of the defendants. However, in the opinions in the *Malin* and *Roberts* cases—in which alone does the court discuss the scope of the offense—the rulings tend to extend the limits of the crime. In the *Malin* case the defendant, mistaking a corps of American troops for British, went over to them. The Attorney General offered evidence of the defendant's words to prove his mistake and real intent. Sustaining the defense

\* Cases and material cited note 35, *supra*. See Nevins, *The American States During and After the Revolution* (N. Y. 1924) 256; Loyd, *The Early Courts of Pennsylvania* (Boston, 1910) 126; Alexander James Wilson, *Nation Builder* (1907) 19 Green Bag 107; Konkle, *James Wilson and the Constitution* (Philadelphia, 1907) 19. Alexander suggests that the harsh suppression and penalizing of the Jacobite rebellion of 1745-1746, in the Scotland of Wilson's youth, was likely a significant element in shaping his political attitudes. 19 Green Bag No. 1, 1, 4.

objection to the introduction of such evidence, the court offered the dubious explanation, that there was no "act" of treason, but admitted the evidence for another purpose:

No evidence of words, relative to the mistake of the *American* troops, can be admitted; for any adherence to them, though contrary to the design of the party, cannot possibly come within the idea of treason. But, as it appears that the prisoner was actually with the enemy, at another time, words indicating his intention to join them are proper testimony, to explain the motives upon which that intention was afterwards carried into effect."

In the *Roberts* case, the court agreed with the defense contention that under the Pennsylvania statute penalizing the "persuading others to enlist" in the enemy army, a case was not made out where it appeared that the person approached refused so to enlist. However, under the charge of adhering to the enemy by himself enlisting, the court noted that "There is proof of an overt act, that the prisoner did enlist", and said that the evidence of his unsuccessful attempt to persuade the other to enlist "is proper to show *quo animo* the prisoner himself joined the British forces."<sup>41</sup> Both cases plainly draw a line between proof of the requisite overt act and proof of the intent.

<sup>41</sup> 1 Dallas 33. The court's ruling on the first point seems clearly unsound, and is contrary to the great weight of authority in the American treason cases. See essay on the American cases, notes 59-61.

<sup>42</sup> *Id.* 39.



The practical effect of such an analysis would seem to be to broaden the types of conduct which may be relied on as the overt act necessary to make out the crime.

Thus the period of the Revolution introduces cautionary notes regarding the scope of "treason" such as were not seen in the colonial era; but the evidences of the new trend are only suggestive and wavering in their implications. The burden of the story remains, the security of the state.

The clearest complaint of the Declaration of Independence, it has been seen, was with reference to oppressive trial practice regarding treason, rather than to the breadth of the crime. There is no evidence that the colonial period had left a specific legacy of fears about abuses in treason trials, though there had quite clearly been cases of such abuse. It is, therefore, not surprising to find that none of the new state constitutions, prior to 1790, includes any limitation on the scope of the offense or the type or amount of proof.<sup>46</sup>

<sup>46</sup> Treasons must be tried in the county where committed: Georgia, Constitution of 1777, XXXIX. The governor may reprieve, but only the legislature may pardon, in cases of treason: Georgia, Constitution of 1789, II, 7; Pennsylvania, Constitution of 1776, Sect. 20 of the Plan of Frame of Government. No person shall be attainted of treason or felony by the legislature; there shall be no corruption of blood or forfeiture of estates, save those of the offender: Maryland, Constitution, 1776, XVI, XXIV; Massachusetts, Constitution, 1780, Part I, XXV; New York, Constitution, 1777, XLI; Pennsylvania, Constitution, 1790, IX<sup>2</sup> 18, 19; Vermont, Constitution, 1786, Ch. II, par. XVII. See Thorpe, *op. cit. supra*, note 1.

The use of the terms of the Statute of Edward III in the basic treason statutes of almost all the states may now fairly be argued to have an extensive significance that we cannot be so sure of in earlier usage. By 1776-1778 the broad pattern of construction of its phrases by the English courts was complete. We have seen evidence that this learning was familiar to American lawyers at least through the standard treatises, and that the most skilled draftsman of the day used the old statutory terms with intent to take them with at least some of the gloss which English judges had put upon them. The Maryland legislature also made this approach explicit in its Act of April 20, 1777, declaring, after it had adopted the well known Language concerning the levying of war and adhering to the enemy; that

the several crimes aforesaid shall receive the same constructions that have been given to such of the said crimes as are enumerated in the statute of Edward the third, commonly called the statute of treasons.

And none of the state statutes of the Revolution used the sort of negative language which Jefferson, in 1778, or the framers of the Federal Constitution, in 1787, regarded as of critical importance to indicate a cautious hedging about

\* Laws of Maryland *op. cit. supra*, note 33, Act of April 20, 1777 (February, 1777, Sess.), Ch. XX.

of the offense. In a supplementary treason act of October 22, 1779, the New York legislature provided

That besides the several Matters by the Law of England, declared to be Evidence and Overt Acts of High Treason, in adhering to the King's Enemies; and which are hereby declared to be Evidence and Overt Acts of High Treason, in adhering to the Enemies of the People of this State as Sovereign thereof; the following Matters shall be and are hereby declared to be Evidence and Overt Acts, of adhering to the Enemies of the People of this State \* \* \*

If one looks at the specific categories of conduct condemned as betrayal of the state the picture is clearly one of a broad effort to safeguard the community with little tenderness for the individual's choices or dissents. Provisions in Pennsylvania, South Carolina and Vermont expressly attacked domestic levy of war in terms reminiscent of the early 17th century acts in the northern colonies.<sup>40</sup> The typical basic treason statutes,

<sup>40</sup> Laws of the State of New York, *op. cit. supra*, note 34, Ch. XXV, p. 85. The penalty was forfeiture of property.

The additional acts specified as "adhering to the enemies of the people" were voluntarily withdrawing to British-controlled areas, or breaking paroles and going to or remaining in British-controlled areas.

<sup>41</sup> The Pennsylvania Act of December 3, 1782, Ch. M, 11 Statutes at Large, *op. cit. supra*, note 11, p. 44, recited facts indicating social and economic tension between the settled and propertied eastern portion of the state and the frontier areas, pointing out that despite straitened finances the commonwealth had spent much in defense of the frontier, and that large debts were owed the the late proprie-

it is true, did not undertake to enact *eo nomine* the law of constructive levy of war; but, as has been suggested, at this late date the fair inference is that the main outlines of English judicial construction of Edward III's statute were intended by those who used its words. The threat of, the

taries, to which each county should contribute its share, "and the unlocated lands within this state are, and always have been considered a valuable fund towards paying and discharging the said debt." It then declared it high treason, to be punished by death and forfeiture of all property, if anyone "shall erect or form, or shall endeavor to erect or form any new and independent government within the boundaries of this commonwealth \* \* \*". United States Constitution, IV, 3, (no new state may be created within the territory of an existing state without the consent of the latter) might now be deemed to confirm the authority of a state to regard such an endeavor as treason. Compare the Pennsylvania Act of March 10, 1787, Ch. MCCLXX, 12 *id.* 378 (co-operation with Massachusetts by offering reward for apprehension of Daniel Shays). There appears to be no reported decision under the statute of 1782. See (1893) 15 Crim. Law Mag. 191, 192; *cf.* an exchange of comment, apparently involving this act, in the debate over the Sedition Act of 1798, Annals, 5th Cong., 2d Sess., 2148 and 2149, between Representatives Otis (Mass.) and Gallatin (Pa.).

In South Carolina, see Act of April 11, 1776, No. 1017, 4 Statutes at Large; *op. cit. supra*, note 20, p. 343. Vermont Acts and Laws, 1779, p. 6, interestingly, recognizes the possible difference between disaffection to the organized community and to the particular government at any given time ("\* \* \* shall levy War against the State, or Government thereof \* \* \*"). Vermont Acts and Laws, 1779, p. 73, enacted the old "Invasion, Insurrection, or public Rebellion" clause which had not been seen since the mid-17th century. *Cf. notes 2-5, supra.*

external enemy naturally predominates in this period, but the colonial period had left some tradition of the use of the treason offense against domestic disturbance.

We have seen that conspiracy to levy war was expressly included in a number of 17th century colonial statutes, and have suggested that though this language disappears in the 18th century books, it is replaced by the provisions of the Statute of Edward III. including that against compassing the death of the king, under which the English courts managed to bring conspiracies to levy war. The omission of any terms analogous to the "compassing" clause in the 1776-1778 statutes would seem to bar including conspiracy to levy war within their scope. In view of the obviously inexperienced character of much state legislation in this period, one may doubt the extent to which this result would actually be in the minds of local legislators, few of whom were likely to approach their problems with the technical skill of Jefferson. In any case, it is noteworthy that in about half of the states, conspiracy to levy war was expressly included in the treason statutes, for the first time since the 1660's, and that related statutes add what in effect are offenses of conspiring to adhere to the enemy, giving him aid and comfort.<sup>30</sup>

<sup>30</sup> Conspiracy to levy war is included in the basic treason statutes of Massachusetts, New Hampshire, Rhode Island and Vermont, note 33, *supra*. It is stated as one basis for the confiscation of property in the Massachusetts Act of May 1, 1779 (4th Sess., Ch. 49), 5 Acts and Resolves of the Province, *op. cit. supra*, note 9, p. 968; and in Rhode Island Acts, October, 1779, p. 24. To be "in any way concerned in forming any Combination, Plot, or Conspiracy, for betray-

Contact with the enemy was the subject of much explicit attention. Some statutes, clearly requiring a showing of specific intent to betray, penalize the conveying of "intelligence" or the holding of "correspondence" "for betraying this State, or the United States, into the Hands or Power of any foreign Enemy".<sup>31</sup> Others penalize the "carrying on a treasonable and treacherous Correspondence" with an enemy.<sup>32</sup> Less clearcut were those acts declaring those persons guilty of treason who were "adherent to: \* \* \* the enemies of this State within the same, or to the Enemies of the United

ing this State, or the United States of America, into the Hands or Power of any foreign Enemy" is declared treason, as a separate offense, in North Carolina, Laws, 1777, 1st Sess., Ch. III, 24 State Records, *op. cit. supra*, note 11, p. 9; Pennsylvania, Act of February 11, 1777, Ch. DCCXL, 9 Statutes at Large, *op. cit. supra*, note 11, p. 45; South Carolina, Act of April 11, 1776, No. 1017, 4 Statutes at Large, *op. cit. supra*, note 20, p. 343; Vermont, Acts and Laws, 1779, p. 6. Conspiracy to deliver to the enemy in war time any vessel belonging to the United States; the state or a subject thereof, was declared a felony to be punished by death in Maryland Act of December 3, 1777, Ch. I, Laws of Maryland, *op. cit. supra*, note 33; and the Pennsylvania Act of September 22, 1780, Ch. CMXV, 10 Statutes at Large, *op. cit. supra*, p. 220, is substantially similar. But *cf.* Connecticut, Acts and Laws (1784), *op. cit. supra*, note 33, p. 66.

<sup>31</sup> See, in note 33, *supra*, the acts of Connecticut, Maryland, North Carolina, Pennsylvania (1777), South Carolina and Vermont; *cf.* Massachusetts, Act of May 1, 1776 (4th Sess., Ch. 21), 5 Acts and Resolves of the Province, *op. cit. supra*, note 9, p. 479.

<sup>32</sup> See Connecticut (1784) and Pennsylvania (1777) acts, note 33, *supra*, and Rhode Island, Acts, October, 1775, p. 160.



States \* \* \* giving to \* \* \* them Aid or Comfort, or by giving to \* \* \* them Advice or Intelligence either by Letters, Messages, Words, Signs or Tokens, or in any way whatsoever, or by procuring for, or furnishing to \* \* \* them any Kind of Provisions or Warlike Stores \* \* \*." <sup>53</sup>

This language might be interpreted to cover the knowing conveyance of information or supplies, without regard to any showing that the conduct was part of a plot to betray the country. In its context in the basic treason acts of the states concerned, however, and in view of the death penalty attached, such language would probably be construed to require a showing of intent to aid the enemy for the defeat or overthrow of the government. Where the legislatures were content to impose less drastic penalties, however, they quite clearly punished persons for the mere fact of voluntary, unauthorized contact with the enemy. The Maryland Act of April 20, 1777, provided that:

\* \* \* if any subject or inhabitant of this state, shall write or convey any letter, or send or carry any message, to any person employed in the service of Great-Britain against the United States, or any of them; without the leave of the governor of this state, or some one of the general officers of the army of the United States, or shall knowingly receive or bring any letter or message from any such person, and shall not deliver or communicate the same, as

<sup>53</sup> See New Jersey and North Carolina (1776) acts, note 33, *supra*, and Virginia, Ordinances of the Convention, December, 1775, Ch. VII, § 9 Hening, *op. cit. supra*, note 11, p. 401.

soon as conveniently may be, to the governor, or some one of the judges or justices of the peace within this state, and shall be thereof convicted in any county court of this state, such person shall be fined not exceeding one hundred pounds current money, in the discretion of the court.<sup>34</sup>

And the Maryland Act of December 3, 1777, declared that:

\* \* \* if any subject or inhabitant of this state shall go on board any vessel of war or transport belonging to the enemy, or to their camp, or to any city, town, port or place, within any of the United States, in their possession, without permission in writing from the governor and the council of this state, and if any subject or inhabitant of this state shall receive any protection for himself or property from the enemy, or any one under their authority, such person, on conviction thereof in the general or any county court of this state, shall be fined by the court not exceeding the rate of ten pounds for every hundred pounds of property belonging to such person within this state; and if any person convicted of any of the offences aforesaid shall not have property within this state, valued and rated agreeable to the late assessment act at more

<sup>34</sup> Laws of Maryland, *op. cit. supra*, note 33, Ch. XX. Note that this act singles out as conduct especially dangerous the mere fact of correspondence with one in the service of the enemy. Rhode Island Acts, July 1780 (1st Sess.), p. 15, provided that anyone bringing a letter from or carrying it to a place in possession of the enemy, without previous inspection thereof by the authorities "shall be proceeded against as an Offender."

than two hundred pounds, the court may fine such person at the rate aforesaid, and also adjudge him to be imprisoned for any term not exceeding one year, or to be whipped not exceeding thirty-nine lashes, or both, in their discretion.<sup>55</sup>

In Massachusetts, the Act of November 8, 1782, provided that:

\* \* \* any Person, an Inhabitant of this State, voluntarily passing from this or any of the United States of America, to any Post or Place within the Continent of America in Possession of the Enemy, without Leave obtained from the Legislature of this State, or the Supreme Executive in the Recess of the General Court, such Person shall not afterwards be permitted to return again to this State, without leave first obtained therefor from the Legislature, and shall forfeit all his Estate to the Use of the Commonwealth \* \* \*

and, further, that if such a person returned without authorization he should be transported back to an enemy-controlled area, and if he return a second time, be imprisoned during the war.<sup>56</sup> In two acts of 1775, Rhode Island first imposed a fine up to £500 or imprisonment up to one year, and subsequently decreed death and forfeiture of all property for any of its inhabitants who should act as pilots aboard any British ship or vessel.<sup>57</sup>

<sup>55</sup> *Id.* Ch. XX.

<sup>56</sup> Acts and Resolves of Massachusetts (reprinted under Ch. 104, Resolves of 1889) • 1782—Ch. 32.—

<sup>57</sup> Acts, August, 1775, p. 88; October, 1775, p. 160. See also Massachusetts, Act of May 1, 1776 (4th Sess., Ch. 21).

<sup>58</sup> Acts and Resolves of the Province, *op. cit. supra*, note 9, p. 479.

A tightening net of New Jersey legislation aimed at curbing trade with the enemy provides the most interesting legislation imposing severe penalties for contact or attempted contact with the enemy without a showing of a specific intent to betray the state. The Act of October 8, 1778, reciting that "many disaffected Subjects of this State do keep up an Intercourse and Communication with the Subjects or Troops of the King of *Great-Britain*, highly dangerous to the Publick Safety \* \* \*," provided that any one owing allegiance to the state who should be taken on his "Way to the Lines or Encampments, or to any Place in the Possession of the Subjects or Troops" of the King, "with Intent to go into the same without a License, Permission or Passport" previously obtained from the authorities should be fined £50-£1000,<sup>2</sup> or be imprisoned 3-12 months, or suffer such corporal punishment not extending to life or member as the court should deem fit. A fine up to £2000, or imprisonment to 18 months, or such corporal punishment not extending to life or member as the court should appoint were provided for any such person who should "voluntarily go into the Lines or Encampments, or to any Place in the Possession of the Subjects or Troops of the King of *Great-Britain*, without a License, Permission or Passport obtained as aforesaid." This act was many times renewed, and more painful or degrading punishments set<sup>3</sup>

<sup>2</sup> Acts of Council and Assembly, *op. cit. supra*, note 33, App. No. V. A fine up to £1000 or imprisonment up to 12 months for the first offense, and death for the second, were provided for anyone who, having a pass to enter enemy territory, took with him more provisions than necessary for his

That the broad sweep of the statutes did not require a showing of specific treasonable intent was shown in the extraordinary proviso which a codifying act of June 24, 1782, felt it necessary to include:

That this Act shall not extend to prevent any commissioned Officer \* \* \* of Troops raised for the Defence of this State, with any Party of Men under his Command, from going into the Lines or Encampments of the Enemy or of their Adherents, or into any Place in their actual Power or Possession, for the Purpose of annoying the Enemy, or of apprehending such Persons as may be found going into, or coming out of the said Lines or Places, or of seizing and securing all such Goods, Wares or Merchandize as may be attempted to be conveyed into, or brought out of, the said Lines or Places, without legal Permission or Passport first obtained as aforesaid. \* \* \*

sustenance; and a fine of £500, with the death penalty for a second offense, was set for anyone "who shall send or convey, or be in any Manner aiding or assisting in sending or conveying Provisions or other Necessaries of any Kind into the Lines or Encampments, or into any Place in the Possession of the Subjects or Troops of the King of Great-Britain, without being duly authorized as aforesaid." This act was supplemented and amended by Acts of December 11, 1778, Ch. CXXIII; December 25, 1779, Ch. CLXXXIV; December 22, 1780, Ch. CCXXXIV; June 28, 1781, Ch. CCLXXIII; October 6, 1781, Ch. CCLXXXIII; June 24, 1782, Ch. CCCXVII. The death penalty was removed and pillorying, imprisonment, compulsory naval service or banishment substituted by the Act of December 22, 1780, *supra*. The codifying act, of June 24, 1782, *supra*, also removed the death penalty for second offenders, but substituted forfeiture of all property.

Ch. CCCXVII, *op. cit. supra*, note 38.

A long series of legislation was capped by the Act of December 21, 1782. Reciting that the law was still being evaded, this act provided that all cattle found to the southeastward of a specified road "shall be deemed and taken as intended to supply the Enemy, and liable to Seizure and Condemnation", and required permits for the movement of cattle from out of state anywhere through the counties of Bergen. Its second section provided that any live stock, provisions or naval stores conveyed or driven towards the enemy lines in specified counties after dark within five miles of any place in enemy control "shall be deemed and taken as intended for the Enemy, and liable to Seizure and Condemnation", together with the equipment used in conveying them, "any Passport or Permission for the same to the contrary notwithstanding." Section 3 stipulated:

That every Article of Provision or Merchandise, seized in any of the Creeks, Rivers, Bays, Meadows, or Upland, in the Counties aforesaid, going towards the Enemy's Lines, or Places aforesaid; and that shall have passed on beyond the inhabited Dwellinghouses adjoining or nearest to the same, if shall be deemed and construed sufficient Evidence to prove that the same were going to the Enemy, and shall be condemned accordingly.

All of these provisions regarding property forfeiture were then given the most drastic application affecting persons concerned with the movement of the suspect property, by Section 4:

That \* \* \* if any Person or Persons shall, with Firelocks, or other Weapons of War, be found carrying or conveying, or be



aiding and assisting in the Conveyance thereof, of any Article or Thing prohibited by this or the above-recited act [the codifying act], such Person or Persons shall be declared guilty of Felony, and on Conviction thereof, shall suffer death accordingly."

In addition to the familiar phrases condemning the levying of war or the adhering to the enemy, the state statutes expressly declared treasonable certain rather clear forms of adherence, such as "joining their Armies" or "enlisting or persuading others to enlist for that Purpose", or "furnishing Enemies with Arms or Ammunition, Provision or any other Articles for such their Aid or Comfort", or "wilfully betraying, or voluntarily yielding or delivering any vessel belonging to this State or the United States to the Enemies of the United States of America". Likewise, the statutes punished as traitors those who

have joined, or shall hereafter join the Enemies of this State, or put themselves under the Power and Protection of the said Enemies, who shall come into this State and rob or plunder any Person or Persons of their Goods and Effects, or shall burn any Dwelling House or other Building, or be aiding or assisting therein \* \* \*

or such persons as maliciously, "with an intention to obstruct the service", dissuade others from enlisting in the army or navy of the United States, or with like malice

spread such false Rumours concerning the American Forces, or the Forces of the Enemy, as will tend to alienate the Affec-

tions of the People from the Government, or to terrify or discourage the good Subjects of this State, or to dispose them to favour the Pretensions of the Enemy

or those who "shall take a Commission or Commissions from the King of Great Britain, or any under his Authority, or other the Enemies of this State, or the United States of America".<sup>61</sup> These types of provision do not represent notable extensions of the general categories of treason, and, indeed, to the contrary, it has been suggested that the Pennsylvania Act of February 11, 1777, which tacks such specifications of treasonable acts onto the traditional provision against adherence to the enemy thereby implies an intention to limit the scope of that offense. Connecticut, North Carolina, and Vermont enacted similarly phrased statutes; obviously three of these were copies, though the evidence does not show clearly which was the original. However, of the other states, nine passed basic treason acts containing the familiar, broad adherence clause without limiting specifications; and Connecticut also had such an act on its books, enacted after its more limited statute and apparently not repealed by any of the reenactments of the more limited statute. The Pennsylvania-type act cannot, thus, be taken as representative of the basic treason legislation in the revolutionary period. Moreover, such restrictive argument as may be drawn from its phrasing, viewed in isolation, carries little conviction as evidence of a prevailing climate of policy when that

<sup>61</sup> Numerous examples of these various phrasings will be found in the statutes cited in note 33, *supra*.

statute is put in the context of the severe test oath legislation, sedition and confiscation acts and like measures which stud the revolutionary statute books in all of the states. The abundance of such enactments suggests that legislative attention was at this time directed with overwhelming urgency towards the security of the new governments.<sup>62</sup>

<sup>62</sup> The restrictive argument is drawn from the phrasing of the Pennsylvania act in the brief of the defendant on reargument in *United States v. Cramer* (U. S. Sup. Ct., October Term, 1944), in the thesis that the specifications of treasonable acts indicated an intention to limit the crime to accomplished aid and comfort, barring as "treason" anything which might be deemed merely an attempt. The statute's terms offer some support to this argument [*Cf. Respublica v. Roberts*, 1 Dall. 39, 1 L. Ed. 27 (Pa. 1778)] but, as is suggested in the text, not with any great weight when the act is viewed in relation to the general legislative history of the time. Indeed, the preamble of the Pennsylvania statute itself bears witness to the prevailing temper, when it justifies the act by a broad assertion of the need for preventing danger to the state:

Whereas it is absolutely necessary for the safety of every state to prevent as much as possible all treasonable and dangerous practices that may be carried on by the internal enemies thereof and to provide punishments in some degree adequate thereto, in order to deter all persons from the perpetration of such horrid and dangerous crimes \* \* \*

Similar acts are Connecticut Acts and Laws (1784), p. 251, North Carolina Laws, 1777 (1st Sess.) Ch. III and (2d Sess.) Ch. VI, and Vermont Acts and Laws, 1779, p. 6, cited note 33, *supra*. The familiar, general clause on adherence to enemies is contained in Connecticut Acts and Laws (1781), p. 507, and in the basic treason statutes of Delaware, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Virginia, while a substantially similar clause forms a part of the funda-

Less clearcut, perhaps, are the New Jersey acts of December 11, 1778, and October 3, 1782, which declared that those who had "voluntarily

mental treason act of South Carolina. See note 33, *supra*. In practically every one of these states there are additional provisions, spelling out what amount to acts of aid and comfort; but these are not so framed as to suggest any limitation on the general provision. The Ordinance of December 23, 1776 in North Carolina, and the act of September 5, 1776, in Pennsylvania, contained the general adherence clause; but these acts would probably be deemed repealed by implication by the subsequent statutes. (See note 33, *supra*.) The Massachusetts act of May 1, 1776 (4th Sess., Ch. 22) is somewhat similar to the Pennsylvania act of February 11, 1777; but is complemented, if not repealed, by the act of February 1, 1777 (3d Sess., Ch. 32), following the model suggested by the Continental Congress.

One might argue that the fact that in some of these cases the legislatures provided penalties much less severe than the sentence of death and forfeiture of estate familiar in high treason, suggests that the legislators were in practice indicating a policy restricting the offense of "high treason" by creating lesser felonies and even misdemeanors for conduct which might have been subjected to the harsher punishments. However, many of these acts explicitly treat the offenses as "treason" or betrayal, and there seems no authority that the severity of punishment is the criterion of what is "treason," the essence of which seems to consist in a betrayal of allegiance. The provision of the United States Constitution, conferring on Congress the authority to fix the penalty in treason, within the limitations there set, implies that it is not the severity of penalty which defines the offense.

A narrower argument restrictive of the scope of the crime might be drawn from the Massachusetts Act of February 1, 1777, (3d Sess., Ch. 32), 5 Acts and Resolves of the Province, *op. cit. supra*, note 9, p. 615; and Rhode Island, Acts, May, 1777 (2d Sess.), p. 30, which provide that "concealment or keeping secret, of any treason, be deemed and

gone to, taken Refuge or continued with, or endeavoured to continue with the Enemy aforesaid; and aid them by Counsel or otherwise" were guilty of high treason, and fixed penalties of forfeiture of estate and death.<sup>63</sup> "Aid by Counsel" might be the same as conveying intelligence of military value, but the phrase was not necessarily that narrow and might include a wide range of dealing or conferring. Whatever be thought of this, the concept of treasonable adherence to the enemy was certainly given an extremely sweeping application in the legislation which imposed penalties ranging from heavy fines or jail sentences to the death sentence and complete forfeiture of property for the mere utterance of opinions denying the independent authority of the new states and asserting the continued sovereignty of the King. Typical of these acts was that passed as late as March 30, 1781, by New York:

WHEREAS, altho' adhering to the Enemies of this State, is by Law, High Treason against the People of this State; yet in Order more effectually to prevent an Adherence to the King of Great Britain, it is deemed requisite that farther Provision should be made by law;

taken *only* misprision of treason.<sup>64</sup> (Emphasis supplied). The result of this negative language is apparently that what otherwise might well be treated as a form of treason by giving aid or comfort to the enemy must be prosecuted as the lesser offense. However, in all the other states, the crime of misprision is created without the use of such restrictive words, so that discretion is apparently left to the prosecutor as to the severity of the penalty which he might seek in a case of concealment.

<sup>63</sup> Acts of Council and Assembly, *op. cit. supra*, note 33.

*Be it therefore enacted* \* \* \* That if any Person being a Citizen or Subject of this State, or of any of the United States of America, and abiding or residing within this State, shall maliciously, advisedly and directly, by preaching, teaching, speaking, writing, or printing, declare or maintain, that the King of Great Britain hath, or of Right ought to have, any Authority, or Dominion, in or over this State, or the Inhabitants thereof, or shall maliciously and advisedly seduce or persuade, or attempt to persuade or seduce any Inhabitant of this State, to renounce his or her Allegiance to this State, or to acknowledge Allegiance or Subjection to the King or Crown of Great Britain, or shall maliciously and advisedly declare or affirm, that he or she doth owe Allegiance to the King or Crown of Great Britain, and be convicted thereof, shall be adjudged guilty of Felony, and shall suffer the Pains and Penalties prescribed by Law in Cases of Felony without Benefit of Clergy. \* \* \*

*Provided, nevertheless,* That it shall and may be lawful for the Court before whom such Offender shall be convicted, if such Court shall deem it proper, instead of giving Judgment of Death, to order and direct that such Offender shall be sent, as soon as conveniently may be, to serve for the Term of three Years, on board of any Ship of War, belonging to this State, or to the United States, or to an Ally of the United States; and if any Offender so ordered by any such Court, to be sent to serve on board any such Ship of War for the Term aforesaid, shall desert from such Service and be found within this State, or any other of the United States, the Person so desert-



ing shall be liable to be punished as a Person attainted of Felony without Benefit of Clergy, \* \* \*

This type of legislation obviously breathes the spirit of hot partisanship, but the New York act is particularly interesting because it suggests that there may have been something more than sheer emotion behind so drastic a punishment of the mere expression of a political allegiance. The preamble emphasizes the need more effectually to prevent persons adhering to the enemy. In other words, the requisite overt act may be defined as conduct possibly many steps removed from an immediate threat to the state where the offending conduct is regarded as creating dangerously fertile ground for the commission of more tangible acts of betrayal. That the mere utterance of a political opinion is being penalized in these cases becomes even clearer in a statute such as that in Virginia, which declared the utterance of the opinion, or action upon it, to be equally offensive, providing a fine not exceeding £20,000 and imprisonment not exceeding five years

\* \* \* if any person residing or being within this commonwealth shall \* \* \* by any word, open deed, or act, advisedly and willingly maintain and defend the authority, jurisdiction, or power, of the king or parliament of Great Britain, heretofore claimed and exercised within this colony,

<sup>1</sup> 1781. (4th Sess.), Ch. XLVIII, Laws of the State of New-York, *op. cit. supra*, note 34, p. 189. Equally severe are Connecticut Acts and Laws, (1781), p. 569; and New Hampshire, Act of April 6, 1781, 4 Laws of New Hampshire, *op. cit. supra*, note 5, p. 34.

or shall attribute any such authority, jurisdiction, or power, to the king or parliament of Great Britain.<sup>65</sup>

Apart from their *prima facie* meaning, the terms of such statutes are obviously capable of being applied to sweep in all manner of incautious political talk in a time of stress. The readiness displayed to put the offense of treason to liberal use for the security of the new states is comparable to any but the most extreme instances of extension of the crime by statute or construction in England.

The broad extent of "treason" during the Revolution is demonstrated, finally, in the severe acts imposing forfeiture of estate, banishment, or, in some circumstances, the death penalty, upon persons who had withdrawn to enemy-controlled areas after the beginning of hostilities. In later

<sup>65</sup> Laws, October, 1776, Ch. V, § 9 Hening, *op. cit. supra*, note 11, p. 170. The bulk of this type of legislation imposed penalties of fine, imprisonment, or civil disabilities. Connecticut: Acts and Laws (1781) p. 569 (alternative penalty). New Hampshire, Act of April 6, 1781, note 34, *supra* (alternative penalty). Rhode Island: Acts, July, 1776, p. 133. Virginia: Laws, May, 1780, Ch. XIV, 10 Hening, *op. cit. supra*, p. 268. See also the acts of Delaware (1777), Maryland (1777), New Jersey (1776), and North Carolina (1776), cited in note 33, *supra*. Compare the usual test oath acts, imposing penalties for refusal to swear, ranging from banishment to civil disabilities: *e. g.*, Delaware, Act of May 18, 1778; Maryland, Act of December 3, 1777, The Laws of Maryland, *op. cit. supra*, note 33, *supra*, Ch. XX; New Jersey, Act of June 5, 1777, Acts of Council and Assembly, *op. cit. supra*, note 33, Ch. XXXIII; Virginia, Laws, May, 1777, Ch. III, § 9 Hening, *op. cit. supra*, p. 281.

and calmer years, judges looking with obvious disfavor on this harsh legislation and eager to apply strict construction to limit the extent of forfeitures thereunder, denied that these were "treason" acts. Those who left the newly independent states for British territory had not hitherto owed allegiance to the states, since the states had not previously existed as independent entities to claim allegiance. Those who withdrew were simply exercising a right recognized in international law to choose the country of their abode; and the states which took their property were simply exercising the basic right of any sovereign to determine the conditions on which "aliens" might hold property within his domain.<sup>66</sup> The theory found some contemporary expression, as in the Rhode Island Act of October, 1779, which declared that a person who had withdrawn to British controlled areas and had not returned and been received as a subject in the state,

shall be held, taken, deemed and judged to have voluntarily renounced all civil and political relation to each and every of the

<sup>66</sup> See *Inglis v. Trustees of the Sailor's Saug Harbour*, 3 Pet. 99, 121, 168, 7 L. Ed. 617, 625, 641 (U. S. 1830); Dana, C. J., in *Martin v. Commonwealth*, 1 Mass. 347, 397 (1805); Sedgwick, J., *id.*, 354; Kent, Ch. J., in *Jackson v. Catlin*, 2 Johns. 248, 260 (N. Y. 1807); *Monaghan v. Baker and Stevens*, 1 Bay 73 (So. C. 1789); *Wells v. Martin*, 2 Bay 20 (So. C. 1796); cf. *Collins v. Kincaid*, 2 Bay 536 (So. C. 1804). But cf. *Cooper v. Telfair*, 4 Dall. 14, 18, 19, 1 L. Ed. 721, 722 (U. S. 1800); Richardson, C. J., in *Thompson v. Carr*, 5 N. H. 510, 515 (1831); argument of counsel, in *McNeil v. Bright*, 4 Mass. 282, 297 (1808); *Camp v. Lockwood*, 1 Dallas 393, 1 L. Ed. 193 (Pa. 1788).

said United States, and be considered as an Alien.<sup>67</sup>

But even in this Act, the preamble's recital of the state's grievance against its former residents indicates that the taking of property under the act was viewed as a penal action rather than a colorless exercise of sovereign authority to define property rights. It was there asserted that:

\* \* \* all countries have a Right to the personal Services of its [sic] Inhabitants, the greatest Exertions of whom, in their different Capacities, are especially requisite for the Defence and Protection of their Lives, Liberties and Properties, during the actual Invasion of Enemies; and a Refusal or withdrawing the same being against the Rights of human Society, and the being voluntarily adherent to public Enemies, by giving them Aid or Comfort, or the seeking of their Protection, amount to a total Renunciation of all former Rights, Privileges and Inheritances whatever: And whereas

\* \* \* sundry of said Inhabitants, regardless of their Ties, and Obligations aforesaid, have left their Habitations, joined and been adherent to the Enemies aforesaid, thereby giving them Aid and Comfort, or continued to reside in Places invaded by or in the Power of said Enemies, and have voluntarily aided or abetted them. \* \* \*

And the New Jersey Act of December 11, 1778, did not hesitate to declare "treason" to be the basis for the confiscation it ordained:

\* \* \* each and every Inhabitant of this State, seized or possessed of, interested in,

<sup>67</sup> Acts, 1779, p. 24.

or entitled unto, any Estate Real or Personal within the same, who hath since \* \* \* [April 19, 1775, and before October 4, 1776] \* \* \* aided and assisted the Enemies thereof, or of the United States, by joining their Armies within this State, or elsewhere, or who hath voluntarily gone to, taken Refuge or continued with, or endeavoured to continue with the Enemy aforesaid, and aid them by Counsel or otherwise, and who hath not since returned and become a Subject in Allegiance to the present Government, by taking the Oaths or Affirmations prescribed in the Act \* \* \* [of September 19, 1776] \* \* \* when required, each and every such Person is hereby declared to be guilty of High Treason against this State; and on Conviction thereof by Inquisition found and \* \* \* final Judgment thereon entered in Favour of the State, as herein after is declared, such Conviction shall amount to a full and absolute Forfeiture of such Person's Estate; both Real and Personal whatsoever within this State, to and for the Use and Benefit of the same: Provided always, That such Conviction shall not extend to affect the Person of any such Offender; but shall operate against his or her Estate only \* \* \*

<sup>68</sup> Acts of Council and Assembly, *op. cit. supra*, note 33, Ch. CXXII. See *Kemp v. Kennedy*, Fed. Cas. #7686 (Cir. Ct. D. N. J. 1808), 5 Cranch 173, 3 L. Ed. 70 (U.S. 1809). The New Jersey act is not the less significant; because it limits its penalties to those who had not merely withdrawn, but had also aided the "enemy", since such aid would not be "treason" unless given by one whom the state regarded as owing it allegiance.

Viewed in the history of the times, and, more particularly, in the context of other legislation abounding in the same statute books, it is clear that the Rhode Island preamble and the New Jersey declaration expressed the practical animus behind the confiscatory acts.

A few of the confiscation acts made the taking depend on a finding that the former owner had actively aided the enemy, in addition to withdrawing to the enemy's territory.<sup>66</sup> Other banishing or confiscatory provisions are ambiguous, reciting that the action is based on the fact that the former owner has "joined" the enemy.<sup>67</sup> But another class of statute, including about as many as

<sup>66</sup> Massachusetts: Act of April 30, 1779 (4th Sess., Ch. 48), 5 Acts and Resolves of the Province, *op. cit. supra*, note 9, p. 966. New Jersey: Act of December 11, 1778, Note 68, *supra*. New York: Act of October 22, 1779, Laws of the State of New York, *op. cit. supra*, note 34, p. 85. Pennsylvania: Act of March 6, 1778, Ch. DCCLXXXIV, 9 Statutes at Large, *op. cit. supra*, note 11, p. 201. South Carolina: Act of February 26, 1782, No. 1155, 4 Statutes at Large, *op. cit. supra*, note 20, p. 523.

<sup>67</sup> Massachusetts: Act of October 16, 1778 (2d Sess., Ch. 24), 5 Acts and Resolves of the Province, *op. cit. supra*, note 9, p. 912; *cf.* Act of May 10, 1777 (4th Sess., Ch. 48), *id.* 648. New Hampshire: Act of November 19, 1778, Acts and Laws, *op. cit. supra*, note 33. New Jersey: Act of December 11, 1778, Acts of Council and Assembly, *op. cit. supra*, note 33, Ch. CXXII; Act of October 3, 1782, Ch. CCCXVIII, *id.*; see *Kemp v. Kennedy*, note 68, *supra*. North Carolina: Laws, 1777, (2d Sess., Ch. XVII, 24 State Records, *op. cit. supra*, note 41, p. 123. South Carolina: Act of March 17, 1783, No. 1189, 4 Statutes at Large, *op. cit. supra*, note 20, p. 568. Quaere, regarding Rhode Island: Acts, October, 1779, p. 24, note 67, *supra*. *Cf.* New York:



the two previous classes together, stated as at least an alternative basis for confiscation, the mere finding that the former owner had in fact withdrawn to territory in enemy control, or had remained in an area which the enemy took over, or, being absent in English territory, when hostilities began, had not returned. So far as this provision in these acts was concerned, there was no need to show any further overt act of aid or comfort to the enemy, nor any specific intent to betray the

Act of May 12, 1784, Ch. LXVI, *op. cit. supra*, note 34, and Laws of the State of New York (1778-1789) (Published according to Act of legislature. Jones and Varick, N. Y. 1789) (misprision). The New York Council of Revision objected to this last act in an opinion of the same date:

Because by the first enacting clause, the voluntarily remaining with the fleets and armies of the King of Great Britain is made an offence highly penal; whereas by the known laws of all nations, persons who remain with their possessions when the country is over-run by a conquering army, are at least excused, if not justified; and should our laws be made to retrospect in a manner so directly contrary to the received opinions of all civilized nations, and even the known principles of common justice, it will be highly derogatory to the honor of the state, and fill the minds of our fellow citizens with the apprehension of suffering in future some heavy punishment for that conduct which at present is perfectly innocent.

See Street, The Council of Revision of the State of New York (Albany, 1859), 234; Law of the Legislature of the State of New York in Force Against the Loyalists etc. (London: Printed by H. Reynell, 1786) App. No. 2, p. 171. The law was enacted, however, notwithstanding the Council's objection. Cf. Street, *op. cit. supra*, pp. 219, 246.

state. Later judges evidently so interpreted the scope of these statutes. That this interpretation is not out of line with the temper of opinion in which this sort of legislation was being passed is indicated by the history of one part of the New York confiscation acts. The Act of October 9, 1780, imposed a tax upon any person whose minor son had joined the enemy since the Declaration of Independence, if the son at the time of joining the enemy was resident with his parents, and had not since returned voluntarily to reside in some part of the state not under enemy control. Being thus bluntly put, the act apparently imposed the tax regardless of any cooperating treasonable intent on the part of the parent. It might have been argued that such an intent element was supplied by a presumption of parental control of a minor son's actions in these circumstances. That any element of treasonable intent on the part of the parent was in fact omitted in the early statute was evidenced, however, by the Act of March 15,

Maryland: Act of April 20, 1777, note 33, *supra*; Act of February 2, 1781, Laws of Maryland, *op. cit. supra*, note 33. Massachusetts: Act of May 1, 1779 (4th Sess., Ch. 49), 5 Acts and Resolves of the Province, *op. cit. supra*, note 9, p. 268. New Hampshire: Act of March 28, 1782, 4 Laws of New Hampshire, *op. cit. supra*, note 5, p. 456. New York: Act of October 22, 1779, Ch. XXV, Laws of the State of New York, *op. cit. supra*, note 34, p. 85; *cf.* Act of July 1, 1780, Ch. LXXVI, *id.* 143; and acts cited in note 73, *infra*. North Carolina: Laws, 1777 (2d Sess.), Ch. XVII, note 70, *supra*. Rhode Island: Acts, Oct. 1779, p. 24. South Carolina: Act of February 26, 1782, No. 115, note 69, *supra*.

See opinions cited in note 66, *supra*.

1781, which, reciting that sons of parents themselves loyal to the American cause may have gone over to the enemy without parental knowledge or consent, provided opportunity for the parent to appear and show that the tax was thus unjustly levied on him.

Severe as were most of the foregoing acts, they yet dealt out only banishment or forfeiture of property. There were in several states, however, statutes which reinforced initial judgments of banishment, based on withdrawal to enemy-controlled areas or refusal to swear allegiance to the state, by providing the death penalty if the individual should thereafter be found within the state.

The analysis of the scope of the offense of treason during the Revolutionary period began by pointing out that, in contrast to the colonial era, there were some significant signs of the growth of an opinion that "treason" must be more carefully defined and limited. Taken in the context of the period as a whole, however, this note of

<sup>22</sup> Chs. XIV, 1780, and XXVIII, 1781, Laws of the State of New-York, *op. cit. supra*, note 34, pp. 160, 176.

<sup>23</sup> Massachusetts: Act of October 16, 1778 (2d Sess., Ch. 24), 5 Acts and Resolves of the Province, *op. cit. supra*, note 9, p. 912. New Hampshire: Act of November 19, 1778, *loc. cit.*, note 70, *supra*. North Carolina: Laws, 1777 (1st Sess.) Ch. III and (2d Sess.) Ch. VI, 24 State Records, *op. cit. supra*, note 11, pp. 9, 84. Rhode Island: Acts, July 1780 (1st Sess.), p. 19. South Carolina: Act of February 15, 1777, No. 1951, 1 Statutes at Large, *op. cit. supra*, note 20, p. 135; 4 *id.* 392; Act of March 28, 1778, No. 1079, 1 *id.* 147, 4 *id.* 424; Act of October 9, 1778, No. 1101, 4 *id.* 450. Vermont: Acts and Laws, 1779, p. 71.

skepticism was still subordinate to a broad [and impulsive] use of "treason" as the means by which to ward off what were viewed as extreme dangers to the security of the states. <sup>1</sup>

There is little to be said regarding the procedural incidents of treason trials as set out in the laws of the Revolutionary period. Almost all the basic treason acts either required "the testimony of two lawful and credible witnesses" (without linking this to the proof of overt acts), or in substance adopted the language of the Act of 7 William III.<sup>75</sup> There is no innovation, and certainly no hint of the type of two-witness requirement later inserted in the United States Constitution. Where provisions regarding the quantum of proof were omitted—which was especially true of acts creating supplementary and novel definitions of treasonable offenses—the obviously haphazard quality of legislative drafting makes it seem more likely due to inadvertence than to policy.<sup>76</sup>

<sup>75</sup> See statutes cited in note 33, *supra*.

<sup>76</sup> The 1776 acts in Connecticut, North Carolina, Pennsylvania and South Carolina, note 33, *supra*, lacked two-witness clauses. That this was due to inadvertence rather than a judgment of policy is suggested by the appearance of such clauses in the more carefully fashioned acts of 1777 in North Carolina and Pennsylvania. Two-witness provisions were included in some of the legislation setting forth novel or supplementary definitions of treasonable offenses. See, e. g., the disloyal utterances provisions of Delaware Act of February 22, 1777, North Carolina, Laws, 1777, Ch. III, and Pennsylvania Act of February 11, 1777, Ch. DCCXL, note 33, *supra*. Cf. Maryland Act of December 3, 1777, Laws of Maryland, *op. cit. supra*, note 33, Ch. XX (misprision).

(c) *The Constitution*

## (1) General Policy

Grievances over oppressive prosecutions for treason or other offenses did not form one of the causes which brought the Federal Convention together in 1787. But once the outlines of a really strong government were sketched, the political liberalism which marked this conservative body made it logical to consider necessary curbs upon abuse of the new power created. The basic policy of the treason clause written into the Constitution emerges from all the evidence available as a restrictive one. Everyone took for granted that, since a new sovereign was being created, its authority must be given protection. The matter which dominated all references to the subject, however, was not the establishment of this protection, but its careful limitation to the minimum necessary to safeguard the community.

This restrictive emphasis stands out with special sharpness, because the story begins on a more positive note. In the summer of 1786 there were stirrings in the Continental Congress looking towards amendments to strengthen the Articles of Confederation. On August 7, 1786, a committee named in July to report amendments, brought forth several proposals, of which Charles Pinckney was apparently the principal author. Article 19 of these amendments proposed to grant to Congress the sole and exclusive power of defining and punishing treason. No limitations

<sup>31</sup> *Journal of the Continental Congress, op. cit. supra*, note 31, p. 497; Burnett, *The Continental Congress* (N. Y. 1941), 664.

were suggested. The other fact which provides background for the story of the treason clause occurred in the autumn of 1786 when mobs of western Massachusetts farmers, taking Daniel Shays for their leader, resorted to force to halt the debt proceedings and mortgage foreclosures against which they had so far fruitlessly sought legislative relief. Shays' Rebellion sent a shudder of shocked alarm through moderate and conservative elements in the country at large, the Continental Congress took secret measures to provide Federal troops to support the energetic action of the Massachusetts executive and militia in successful suppression of the outbreak, and additional, powerful impetus was given the movement for creating a stronger central government. Records of the Continental Congress, of the Federal Convention and of the debate over ratification of the Constitution furnish ample evidence of how vividly the threat of Shays' Rebellion was in the minds of proponents of the new government. The Constitution contained specific authorization and means for the central government to support or initiate action against further insurrection.

\* Massachusetts legislation and executive pronouncements declared the rebellion to be "treason." See, in Acts and Resolves of Massachusetts, *op. cit. supra*, note 56, the Acts of February 16 and 26, 1787 (1786, Chs. 56 and 59) pp. 176, 187; Resolves of February 4, March 10, and June 15, 1787, and June 10 and 19, 1788, *id.*, 429, 515, 677, 185; Governor's Messages of September 28, 1786 and February 3, 1787, *id.*, 928, 960. See 32 and 33 Journals of the Continental Congress, *op. cit. supra*, note 34, (1787) pp. 24, 38, 39, 85, 93-105, 110-111, 176n, 719-722, 724, 729; and numerous letters cited under heading "Shays' Rebellion" in Burnett, Letters, *op. cit. supra*, note 37. Compare Con-



With positive provision for the safety of the state thus to the fore in Congressional proposals for changing the frame of government, and the example of Massachusetts strong in the minds of men looking for assurances of orderly and secure economic and social development, the limitations of the treason clause must reflect deeply held notions of individual security against official oppression.

gressional reactions to the mutiny of the soldiers demanding back pay, in Philadelphia, 1783. 5 Elliott, *Debates in the Several State Conventions on the Adoption of the Federal Constitution*, (2d ed. Washington, 1854) 66, 92, 93; cf. 7 Burnett, *op. cit. supra*, p. 499. Regarding the Congressional provision of troops to support Massachusetts, see 5 Elliott, *op. cit. supra*, 94-95, 99; cf. *id.* 108. As to the influence of the rebellion on the movement for the Constitution, see *The Federalist*, (Lodge ed. N. Y. 1908) Nos. XXV and LXXIV (Hamilton) and XLIII (Madison); 3 Elliott, *op. cit. supra*, pp. 82, 101, 180, 274 (Virginia Convention); 4 *id.* 20, 96, 112, 220 (North Carolina) 282 and 327 (South Carolina). See U. S. Const., I, 8 and 9 and IV, 4.

On the eve of the Federal Convention, the New York Act of February 16, 1787 (10th Sess. Ch. XXIX, 2 Laws of the State of New York (1778-1789) (Published according to Act of legislature. Jones and Varick. Printed by Hugh Gaine, New York, 1789) 55, declared:

That if any Person do levy War against the People of this State, within this State, or be adherent to the Enemies of the People of this State, or of the United States of America, within this State, giving to them Aid and Comfort in this State, or elsewhere, and be thereof, by good Proof, attainted of open Deed, such Offences, and none other, shall be adjudged Treason against the People of the State of New-York.

A two-witness requirement in the terms of the Statute of William III was also provided. The declaration that

The positive emphasis is still apparent at the beginning of the Convention. The Pinckney plan for the new government, defining the powers of the federal legislature in terms obviously drawn from the 1786 proposals to the Continental Congress, provided

15. S. & H. D. in C. ass. shall institute  
Offices and appoint Officers for the Depart-

"none other" than the two named offenses should constitute treason was without precedent in state treason legislation. No clue to the origin of this language has been found in the available records of the legislature. (See Journal of the Assembly, 10th Sess., 1787, pp. 9, 10, 14, 38, 40, 41, 45, 50, 54; Journal of the Senate, *id.*, 24, 25, 27, 29, 33; a further check of records available in Albany, made through the courtesy of Miss Frances D. Lyon, Law Librarian of the New York State Library, revealed no additional information), nor is there evidence that the act came to the attention of the Federal Convention. The Journal of the New York Assembly for the 10th Session, 1787, p. 9, notes that the bill which became the Act of February 16, 1787, was laid before the house by Mr. Jones, pursuant to the law for revising the laws of the state. Previously, the Journal notes, (p. 5), it had been "Ordered that Mr. [Alexander] Hamilton, Mr. [Samuël] Jones, Mr. [John] Ray, Mr. J. [John] Livingston, Mr. C. [Caleb] Smith, or any 3 or more of them, be a Committee to inspect what laws are expired, or near expiring, and that they, from time to time report to the House which of them they judge necessary to be revived or continued, and likewise what new laws they shall conceive necessary to be made for the benefit of the State." There is no evidence that Hamilton urged a restrictive policy on "treason" in the Philadelphia Convention, though in *The Federalist*, he cites the treason clause as one item to answer the criticism that the Constitution lacked a proper bill of rights. See note 96, *infra*.

ments of for. Affairs, War, Treasury and Admiralty—

They shall have the exclusive Power of declaring what shall be Treason and Mistr. of Treason agt. U. S. \* \* \* \* \*

Hamilton's plan of government, apparently leaving the creation of treasonable offenses to general powers conferred on the central government, provided that the Executive should have power to pardon in cases of treason only with the approbation of the Senate. Both the Executive and Senate, holding office during good behaviour, were a step removed from the electorate, which was to choose the Electors who would select Senators and a "Governour". It is not surprising that Hamilton's only reference to treason should seek to enforce a strong hand against disaffected persons.<sup>51</sup>

The first evidence of concern to set limits to the offense is in a draft of the "New Jersey Resolutions." Paterson's notebook includes a Resolution

that it is necessary to define what offences, committed in any State, shall be deemed high treason against the United States.

<sup>50</sup> 2 Farrand, ed., *The Records of the Federal Convention of 1787* (New Haven, 1937) 136. This is from the document which Farrand accepts as the best evidence of Pinckney's plan. In the version which Pinckney sent John Quincy Adams, in December, 1818, when the latter was preparing the *Journal of the Convention* for publication, the treasons section is similar to that in the Constitution. 3 *id.* 598, 608. Since the general emphasis of the Pinckney plan seems to be on defining the federal relationship, it is likely that the grant of "exclusive" power to declare treasons was intended to exclude state legislative power, rather than to distinguish legislative-made from judge-made law.

<sup>51</sup> 1 *id.* 292. Through, cf. note 96, *infra*.

This proposal is crossed out, in Paterson's record book, and is not included in Madison's report of the New Jersey plan.<sup>22</sup> In any event, its place in a body of "small state" resolutions suggests that delimitation of central government as compared to state authority, rather than protection of individual liberty, was the moving force; and this hypothesis is consistent with the lengthy discussion in the Convention over the relative boundaries of federal and state definition of treasons. On the policy of protecting the individual, there was no small state-large state division in the Convention, and, indeed, some of the most vigorous advocacy of limitations was by Virginia delegates.

Save for these references in papers laid before the Convention, there was no mention of "treason" until the Committee of Detail submitted its draft Constitution to the Convention in August, 1787. The treason clause was the creation of this Committee. No specific instructions on the subject were included in the resolutions sent to the Committee, and its authority to deal with the matter must be derived from the omnibus resolution providing that the "national legislature" be empowered "to legislate in all cases to which the separate States are incompetent."<sup>23</sup>

<sup>22</sup> *Id.* 242-243. The resolution on treason, crossed out in Paterson's notebook, appeared in the copy of these resolutions printed February 15, 1788 in the *Maryland Gazette* and *Baltimore Advertiser*. Farrand thinks it "altogether probable" that the printer obtained the document from Luther Martin, who had stated in his *Genuine Information* that he had a copy of the New Jersey plan. 3 *id.* 614.

<sup>23</sup> See 2 Curtis, *History of the Constitution of the United States*, (N. Y. 1861) 384; Meigs, *Growth of the Constitu-*

In this, as in most other matters, we have little direct evidence of the deliberations of Ellsworth (Connecticut), Gorham (Massachusetts), Randolph (Virginia), Rutledge (South Carolina), and Wilson (Pennsylvania), in the Committee of Detail. What we have, however, marks the beginning of concentration on limiting the scope of the offense. A draft in Wilson's handwriting contains the simple authorization of the Pinckney plan, to Congress "to declare what shall be Treason against the United States", with the addition, in Rutledge's hand, of the limitation of the punishment, "not to work Corruption of Blood or Forfeit except during the Life of the Party." However, a document in the handwriting of Randolph, (with each item checked or crossed out, indicating use of the paper in preparation of subsequent drafts), narrows the definition of legislative power to the authority "To declare it to be treason to levy war against, or adhere to the enemies of the U. S." And in the draft Constitution reported by the Committee, August 6, 1787, Article VII, Section 2 provided that

Treason against the United States shall consist only in levying war against the United States, or any of them; and in adhering to the enemies of the United States, or any of them: The Legislature of the United States shall have power to declare the punishment of treason: No person shall be convicted of treason, unless on the testi-

tion (Philadelphia, 1900) 252-254. Farrand, *The Framing of the Constitution of the United States*, (New Haven, 1913) 48; advances the suggestion of the source of the committee's authority to draft the treason clause.

mony of two witnesses. "No attainder of treason shall work corruption of blood nor forfeiture, except during the life of the person attainted."

At one stroke, the basis of the restrictive policy has now been laid: all authority is taken from any other agency, to define the extent of the crime; the decision is taken that there shall be no analogy to the ancient offense of compassing the king's death; a stipulation on quantum of proof is given constitutional sanction. But, the language on adherence is not qualified by the traditional "aid or comfort" phrase, nor is there explicit recognition of the overt act as an element of the offense, and of course, therefore, no linking of the two-witness requirement to the overt act. Acts of treason against a state are made treason against the United States; a provision finally eliminated.

The treason clause was discussed at some length by the Convention, in Committee of the Whole, August 20, 1787, in a debate which serves to underline the framers' preoccupation with limiting the scope of the crime. This is apparent, in the first place, from the discussion of the general terms of the clause. Surprisingly, Mr. Madison opened the discussion with a plea for less restrictive language:

Mr. Madison thought the definition too narrow. It did not appear to go as far as the Stat. of Edwd. III. He did not see why more latitude might not be left to the Legislature. It wd. be as safe as in the hands of State legislatures; and it was incon-

<sup>1</sup> 2 Farrand, *op. cit. supra*, note 80, pp. 144, 168, 182.

<sup>2</sup> 4 *id.* 45.



venient to bar a discretion which experience might enlighten, and which might be applied to good purposes as well as be abused.<sup>85</sup>

Mr. Mason, on the other hand, was in favor of following the language of the Statute of Edward III. That he believed the old terms were valuable to limit the definition of the crime is suggested by the fact that later in the discussion he moved to add to the clause concerning adherence to the enemy the familiar terms of aid and comfort,—“as restrictive of adhering to their Enemies &c.”—

<sup>85</sup> Unless otherwise noted, all of the following incidents of the discussion of August 20 will be found in 2 Farrand, *op. cit. supra*, note 80, pp. 345-350.

Note that Madison's argument bears out the conclusion reached in the examination of the colonial and state materials, that no notable legacy of protest against abuse of treason prosecutions had resulted. Compare Madison's strictures on the too limited character of the offense as framed with his comments in a letter of October 18, 1787, to Washington, regarding Mason's objections to the Constitution. 3 *id.* 130; 5 Writings of James Madison (Hunt, ed. N. Y. 1904) 11, 13. Madison declares that it is proper, Mason's criticism to the contrary notwithstanding, that the Constitution does not “secure” the common law:

“Since the Revolution every State has made great inroads & with great propriety in many instances on this *monarchical* code. \* \* \* What could the Convention have done? If they had in general terms declared the Common law to be in force, they would have broken in upon the legal Code of every State in the most material points; they w<sup>d</sup> have done more, they would have brought over from G. B. a thousand heterogeneous & antirepublican doctrines, and even the *ecclesiastical Hierarchy* itself, for that is a part of the Common law. \* \* \*

the latter he thought would be otherwise too indefinite—". Further discussion over the extent to which the Committee of Detail had enlarged or narrowed the scope of the language of Edward III's statute shows that the old English law was at least prominently in the minds of the Convention.

In the midst of the debate concerning relative state and federal power to create the offense, King introduced the only note of skepticism as to the importance of limiting the definition of treason, when he

observed that the controversy relating to Treason might be of less magnitude than was supposed as the legislature might punish capitally under other names than Treason.

Taken in its general implications, this was clearly not the view of Messrs. Gouverneur Morris and Randolph, who moved to postpone further consideration of the suggested treason clause in order to take up a substitute which declared:

Whereas it is essential to the preservation of liberty to define precisely and exclusively what shall constitute the crime of Treason; it is therefore ordained, declared & established, that if a man do levy war agst. the U. S. within their territories, or be adherent to the enemies of the U. S. within the said territories, giving them aid and comfort within their territories or elsewhere, and thereof be provably attainted of open deed by the People of his condition, he shall be adjudged guilty of Treason.

Despite its preamble, this proposal seems less confining than that of the Committee of Detail; but

it is clear that its proponents offered it out of a desire to set closer limits to the crime. Their motion was defeated, 8-2; but the vote seems to express a preference for working with the pending draft in order to get on with the day's business, rather than a disagreement on the merits, for before the day was out the two principal additions of the Morris-Randolph draft ("aid and comfort" and the requirement of an overt act) were inserted in the draft which lay before the Committee of the Whole.

In addition to the implications of such discussion of the general language used in the section, distrust of the possible scope of the offense is reflected particularly in the amendment made to the clause concerning adherence to enemies. There was initially some confusion over just what was broad, and what was narrow terminology here. Randolph introduced the subject by saying that he

thought the clause defective in adopting the words "in adhering" only. The British Stat: adds, "giving them aid and comfort" which had a more extensive meaning.

Ellsworth "considered the definition as the same in fact with that of the Statute", and in replying to him, Gouverneur Morris reflected some confusion over the breadth of the terms involved, saying that

"adhering" does not go so far as "giving aid and comfort", or the latter words may be restrictive of "adhering". \* \* \* in either case the Statute is not pursued.

Wilson thought the added words no limitation: he held "giving aid and comfort" to be explanatory, not operative words; and that it was better to omit them—

Dickinson then objected from the viewpoint of one concerned to limit the definition: he

thought the addition of "giving aid and comfort" unnecessary & improper; being too vague and extending too far—

Doctor Johnson apparently felt the added words would limit, by explaining, the basic terms in the provision, since he "considered 'giving aid and comfort' as explanatory of 'adhering'." Randolph and Morris then made the motion to postpone consideration of the draft by the Committee of Detail, to consider the draft quoted above. The restrictive purpose indicated by their proposed substitute seems rather inconsistent with their earlier indications that they regarded the "aid and comfort" phrase as possibly extending the area of the offense, for it was, nevertheless, employed in their own proposal. However, after all of this confusion, the final action of the day was taken on a clearly restrictive note.

Col. Mason moved to insert the words "giving (them) aid and comfort", as restrictive of "adhering to their Enemies &c" the latter he thought would be otherwise too indefinite—This motion was agreed to (Conn: Del: & Georgia only being in the Negative).<sup>36</sup>

<sup>36</sup> Words in parentheses are from the Journal.

Mason was being consistent with his expression of opinion, at the outset, in favor of "pursuing the Stat: of Edwd. III".

Finally, a fundamentally restrictive attitude also marks the treatment of the requirements of an overt act and of two witnesses to establish the offense. The draft by the Committee of Detail did not refer to the proof of an overt act. The Journal of August 20 notes that a motion was adopted to insert the words "some overt act of" at the beginning of the draft clause, so that the draft read, "Treason against the United States shall consist only in some overt act of levying war against the United States, etc. \* \* \*".

Subsequently, the Committee of the Whole inserted "to the same overt act" after "witnesses", and it was then voted to strike the reference to overt acts which had been placed at the beginning of the section. Curiously, Madison's "Notes" contain no direct reference to these various votes; but the inference seems fair that there was a definite intention to require the showing of an overt act as an independent element of the offense, and that the first insertion, which made this plain, was stricken probably for artistic reasons, after the reference to an overt act had been linked with the requirement of two witnesses. This harmonizes with the statement of Mr. Dickinson, who

wished to know what was meant by the testimony of two witnesses, whether they were to be witnesses to the same overt act or to different overt acts. He thought also that proof of an overt act ought to be expressed as essential to the case.

Doctor Johnson also "considered \* \* \* that something should be inserted in the definition concerning overt-acts."

The interpretation of the proceedings is somewhat clouded by the fact that the final exchange of comment on the language involving "overt act" emphasized solely the strengthening of the evidentiary guaranty against perjury. When it was moved to insert "to the same overt act" after the two-witness requirement, Madison notes that

Doct Franklin wished this amendment to take place—prosecutions for treason were generally virulent; and perjury too easily made use of against innocence.

And James Wilson observed that

much may be said on both sides. Treason may sometimes be practised in such a manner as to render proof extremely difficult—as in a traitorous correspondence with an Enemy.

The vote was 8-3 in favor of inserting the overt-act phrase in connection with the requirement of two witnesses. Though this may seem to subordinate the overt-act phrase, the inference seems a fair one, from the record as a whole, that it was thought important to stipulate expressly that an overt act should constitute a distinct element of proof of the offense.

As much time was devoted on August 20 to discussing the problem of treason in the federal system—the extent to which the central government and the states might, respectively, undertake to define the offense—as was given to debate on all the other points considered. However, the de-



bate on the general phrasing and elements of the offense, so far as it went, seems clearly to establish a general agreement on the wisdom of limiting the scope of the offense in all doubtful cases.<sup>28</sup> The only respects in which the Convention may be said to have rejected opportunities to confine the scope of the offense were in rejecting the suggestions that the states be denied any authority to define treason against themselves, and that participation in a civil war between a state and the nation, be excepted. The debate seems, however, to have turned on judgments of what would constitute an equitable and workable plan in this regard for a federal system; and to have involved no conscious departure from the policy of safeguarding the individual from oppressive extensions of the nature of "treason."<sup>29</sup>

The only member of the Convention of whose views we have any substantial evidence, apart from the record of the Convention discussion, is

<sup>28</sup> The other point in connection with "treason" which led to considerable discussion was the proposal to deprive the President of the power to pardon in such cases. This debate yields no help on the definition of the scope of the offense, save as it further indicates the general understanding that fundamental domestic disturbances were embraced within "treason". 2 *id.* 626-627. The concern manifested in this discussion of the pardon power, lest the President abuse it to protect his accomplices in an effort to take unconstitutional power to himself, seems the only instance in which a positive concern for the safety of the state qualified the Convention's general preoccupation with protection of the individual.

<sup>29</sup> 2 Farrand, *op. cit. supra*, note 80, pp. 345, 348-349;

3 *id.* 223.

James Wilson. He is a key figure, however, as a member of the Committee of Detail, which took the responsibility for taking a restrictive rather than an extensive approach to the definition of the offense. The crisp statement and logical progression of the clause as it came from the Committee of Detail strongly suggests the hand of Wilson, probably the ablest lawyer on the committee.<sup>90</sup> We have seen that Wilson had long been familiar with basic English materials on the law of treason. In 1778 he had joined the defense in the Pennsylvania treason trials when that was a highly unpopular thing to do, and had stoutly upheld the wisdom of avoiding the creation of novel treasons by staying close to the familiar terms of the Statute of Edward III. His participation in the Convention discussion of August 20 is not very illuminating, it is true. He was against inclusion of the "aid and comfort" phrase, significantly, however, on grounds of draftsmanship and not of policy. Regarding the two witness requirements, he recognized the dangers of putting an impractical burden on the prosecution; but when the question was put to the vote, the Pennsylvania delegation was recorded as unanimous for the limitation. His papers contain an undated memorandum headed "Reasons for adopting the Constitution", and

<sup>90</sup> Cf. Nott, *The Mystery of the Pinckney Draught* (N. Y. 1908) 187. Wilson speaks most positively in the discussions of the treason clause in the role of draftsman-technician. See 2 Farrand, *op. cit. supra*, note 80, pp. 346, 348-349.

among the 17 points which he thought significant enough to list was <sup>91</sup>

The accurate Description of Treason—its [one word and part of another crossed out: apparently "mild Puni", probably "mild Punishment"] Consequences confined to the Cri [Criminal?]; consid. Art. 3. s. 3. Mont. 6.12.c. 7. ss. 18. [apparently a reference to Montesquieu]

The inference, that Wilson took particular interest in the treason clause, and that he believed its virtue lay in its fundamentally restrictive character, is borne out by his detailed praise of it in the Pennsylvania ratifying convention. Twice, of his own motion, and without any criticism of the provision having been voiced by an alert and suspicious opposition, Wilson cited the clause as an ornament of the proposed Constitution. On December 4, 1787, in his speech pointing out the positive qualities of the Constitution, Wilson, after defending the extent of the judicial power conferred, said:

I am happy to mention the punishment annexed to one crime. You will find the current running strong in favor of humanity: for this is the first instance in which it has not been left to the legislature to extend the crime and punishment of treason so far as they thought proper. This punishment, and the description of this

<sup>92</sup> Papers of James Wilson, 1775-1792 (MSS. Pennsylvania Historical Society) 60. On page 59 is a list of "Objections", none of which refers specifically to treason. Number 26 on this list, however, is—"Crimes shall be tried by Jury: therefore Congress may declare Crimes."

crime, are the great sources of danger and persecution, on the part of government, against the citizen. Crimes against the state! and against the officers of the state! History informs us that more wrong may be done on this subject than on any other whatsoever. But, under this Constitution, there can be no treason against the United States, except such as is defined in this Constitution. The manner of trial is clearly pointed out; the positive testimony of two witnesses to the same overt act, or a confession in open court, is required to convict any person of treason. And, after all, the consequences of the crime shall extend no further than the life of the criminal; for no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.<sup>92</sup>

Again, on December 7, 1787, after taking the opposition to task for assigning the worst motives in the people's governors and representatives, Wilson argued that there was no special reason to fear this where the government had no separate interests from those of the people. He continued:

Whenever the general government can be a party against a citizen, the trial is guarded and secured in the Constitution itself, and therefore it is not in its power to oppress the citizen. In the case of treason, for example, though the prosecution is on the part of the United States, yet the Congress can neither define nor try the crime. If we have recourse to the history of the different governments that have hitherto subsisted,

<sup>92</sup> 2 Elliott, *op. cit. supra*, note 78, p. 469.

we shall find that a very great part of their tyranny over the people has arisen from the extension of the definition of treason. Some very remarkable instances have occurred, even in so free a country as England. If I recollect right, there is one instance that puts this matter in a very strong point of view. A person possessed a favorite buck, and, on finding it killed, wished the horns in the belly of the person who killed it. This happened to be the king; the injured complainant was tried and convicted of treason for wishing the king's death.<sup>2</sup>

Wilson placed such emphasis on the constitutional provision that he devoted an entire lecture to it in his law lectures delivered at the College of Philadelphia, in 1790 and 1791. Again, he stressed as the whole point of his analysis the virtues of setting careful bounds to the crime.

It is the observation of the celebrated Montesquieu, that if the crime of treason be indeterminate, this alone is sufficient to make any government degenerate into arbitrary power. \* \* \*

Praising as the most important part of the Statute of Edward III the provision that the Parliament, and not the judges, should pass on novel cases claimed to be "treason", he argued the superiority of American law in placing this restrictive principle beyond even legislative encroachment:

In this manner, the citizens of the Union are secured effectually from even legislative

<sup>2</sup> Elliott, *op. cit. supra*, note 78, p. 487; McMaster and Stone, *Pennsylvania and the Federal Constitution* (Historical Society of Pennsylvania, 1888) 351-353; 3 Farrand, *op. cit. supra*, note 80, p. 163, CL.

tyranny: and in this instance, as in many others, the happiest and most approved example of other times has not only been imitated, but excelled.<sup>94</sup>

Such continuing concentration on a clause which, whatever its merits, is certainly not one of the more conspicuously discussed parts of the Constitution, strongly suggests pride of authorship. At any rate, there can be no doubt as to the central conclusion of policy which Wilson would derive from the clause for the guidance of legislators and judges.

If we turn from the Philadelphia Convention and its members to the great debate which surged throughout the country over the ratification of the Constitution, the story is the same. The Constitution was everywhere under attack, because it contained no Bill of Rights, and created a strong government with broad powers, which the imagination of its opponents foresaw could be turned in many ways to destroy the liberties of the citizen. In this situation, it is of the highest significance that without material exception, the treason clause was adduced only by proponents of the Constitution, as a prideful argument for the protection with which that document surrounded the individual; and that there was no real effort made at any time, so far as the record shows, to claim that the new government could oppress its people under the guise of prosecutions for "treason".

<sup>94</sup> Lectures on Law, delivered in the College of Philadelphia 1790 and 1791, Ch. V, 3 Works of Hon. James Wilson (Bird Wilson, ed. Philadelphia, 1804) 95-106. As a check on the completeness of the search of the Wilson papers, this study has enjoyed the counsel of Mr. Burton Alva Konkle of Swarthmore, Pa., long a student of Wilson's career.



Madison sets the tone of debate, in *The Federalist*.

As treason may be committed against the United States, the authority of the United States ought to be enabled to punish it. But as new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other, the convention have, with great judgment, opposed a barrier to this peculiar danger, by inserting a constitutional definition of the crime, fixing the proof necessary for conviction of it, and restraining the Congress, even in punishing it, from extending the consequences of guilt beyond the person of its author.<sup>95</sup>

In another number of *The Federalist*, Hamilton lists the treason section among several provisions protecting the liberties of the individual, in answer to the criticism of the absence of a Bill of Rights.<sup>96</sup> In Massachusetts, "Cassius" (James Sullivan) asserted, of the treason clause:

This section is truly republican in every sense of the expression, and is of itself fully

<sup>95</sup> *Op. cit. supra*, note 78, No. XLIII, pp. 269, 463. Madison here takes an advocate's position in interesting contrast to his opinion on the floor of the convention in favor of broader discretion for the legislature. However, this does not affect the relevance of his argument in *The Federalist*, as reflecting the prevailing thought by which the treason clause was believed justified. Compare his warning, in his first speech in the Virginia ratifying convention, that in republics the turbulence, violence and abuse of power of majorities have more frequently than any other cause produced despotism. 3 Elliott, *op. cit. supra*, note 78, p. 87.

<sup>96</sup> *Id.*, No. LXXXIV, pp. 533, 534.

adequate to proving that the members of the federal convention were actuated by principles the most liberal and free— This single section alone is sufficient to enroll their proceedings on the records of immortal fame.

Contrast this section with the laws of England, in regard to treason, and, notwithstanding the boasted rights of the subject in that isle, we shall find our own in this, as well as almost every other particular, far to exceed them.<sup>97</sup>

In North Carolina, "Marcus" (James Iredell) answered the objections which George Mason of Virginia had carried from the Convention to the hustings. Mason had raised the fear that under the "necessary and proper" clause in the enumeration of the powers of Congress, new crimes and unusual punishments might be created. Iredell pointed out that

\* \* \* in the case of treason, which usually in every country exposes men most to the avarice and rapacity of government, care is taken that the innocent family of the offender shall not suffer for the treason of their relation. This is the crime with respect to which a jealousy is of the most importance, and accordingly it is defined with great plainness and accuracy, and the temptations to abusive prosecutions guarded against as much as possible \* \* \*

<sup>97</sup> Essays on the Constitution of the United States (Ford, ed. N. Y. 1892) : Letters of Cassius, X, p. 42.

<sup>98</sup> Pamphlets on the Constitution of the United States (Ford, ed. Brooklyn 1888) 360; 2 McRee, Life and Correspondence of James Iredell (N. Y. 1857) 199, 207. Cf. the numerous charges to federal Grand Juries, by Mr. Justice Iredell, in McRee.

The closest approach to a clash over the treason clause in the state ratifying conventions took place in Virginia. Replying to a speech of Patrick Henry in which the spectre of "the most grievous oppressions" had been raised, George Nicholas took the initiative in citing the treason clause:

Treason consists in levying war against the United States, or in adhering to their enemies, giving them aid and comfort. The punishment of this well-defined crime is to be declared by Congress; no oppression, therefore, can arise on this ground. This security does away the objection that the most grievous oppressions might happen under color of punishing crimes against the general government. The limitation of the forfeiture to the life of the criminal is also an additional privilege.<sup>99</sup>

Subsequently, without directly attacking the treason clause, Henry complained of the failure to forbid cruel and unusual punishments:

Congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason, to the lowest offence—petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives.

The constitutionalist leaders were not men to let a point slip by, especially so flagrant a slip. Nicholas promptly corrected Henry:

<sup>99</sup> Elliott, *op. cit. supra*, note 78, pp. 102-103.

But the gentleman says that, by this Constitution, they have power to make laws to define crimes and prescribe punishments; and that, consequently, we are not free from torture. Treason against the United States is defined in the Constitution, and the forfeiture limited to the life of the person attainted. Congress have power to define and punish piracies and felonies committed on the high seas, and offences against the laws of nations; but they cannot define or prescribe the punishment of any other crime whatever, without violating the Constitution \* \* \*

Randolph also caught up Henry on the point:

The honorable gentlemen observe that Congress might define punishments, from petty larceny to high treason. This is an unfortunate quotation for the gentlemen, because treason is expressly defined in the 3d section of the 3d article, and they can add no feature to it. They have not cognizance over any other crime except piracies, felonies committed on the high seas, and offences against the law of nations.<sup>100</sup>

It is noteworthy that when the Virginia convention reached the treason section in its order in a section-by-section discussion of the Constitution, the record shows no mention of the provision, though there had been a very lengthy argument over the preceding parts of Article III.

The fight in North Carolina was a particularly hot one, and concluded with a refusal either to ratify or reject the proposed Constitution, but rather a stipulation that North Carolina would

<sup>100</sup> *Id.*, 447, 451, 466.

ratify if certain rights were declared and ambiguous passages clarified. Since the opposition was alert to point out every aspect in which they saw the danger of political oppression of the individual under the new government, it is again significant that when the convention reached the treason clause in its section-by-section consideration of the document, the record states merely, "3d section [Article III] read without any observation."

Subsequently, what began as apparent criticism of the treason clause ended in weak professions of mistaken meaning on the part of an opposition leader. Mr. Lenoir had claimed, against the Constitution, that

They have also an exclusive legislation in their ten miles square, to which may be added their power over the militia, who may be carried thither and kept there for life. Should any one grumble at their acts, he would be deemed a traitor, and perhaps taken up and carried to the exclusive legislation, and there tried without a jury. We are told there is no cause to fear. When we consider the great powers of Congress, there is great cause for alarm. \* \* \*

\* \* \* There is no assurance of the liberty of the press. They may make it treason to write against the most arbitrary proceedings.

Richard Dobbs Spaight, a member of the Philadelphia Convention, in return expressed astonishment at the extreme fears voiced:

But the gentleman has gone farther, and says, that any man who will complain of their oppressions, or write against their usurpation, may be deemed a traitor, and

tried as such in the ten miles square, without a jury. What an astonishing misrepresentation! Why did not the gentleman look at the Constitution, and see their powers? Treason is there defined. It says expressly, that treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. Complaining, therefore, or writing, cannot be treason. [Here Mr. Lenoir rose, and said he meant misprision of treason.] The same reasons hold against that; too \* \* \* 101

In other states, advocates of the Constitution cited the treason clause as a valued part of the document; and the opposition maintained silence.<sup>102</sup> The only respect in which the debates over ratification may be said to have suggested a broader concept of "treason," in consequence of the provisions of the Federal Constitution was the inference which might be drawn that any circumstances which would call into play the guaranty extended to every state of a republican form of government would probably involve treasonable conduct on the part of those threatening the state government. But at most this seems to involve no more than application of familiar precedents concerning the constructive levying of war.

<sup>101</sup> 4 *id.*, 176, 203, 205, 209. Compare Fredell's further reply to Lenoir, *id.*, 219, 220.

<sup>102</sup> See remarks of General Brooks in the Massachusetts Convention, in *Debates, Resolutions and other Proceedings of the Convention of the Commonwealth of Massachusetts* (Boston, 1836), 201; remarks of Messrs. Hartley and McKean, in the Pennsylvania Convention, McMaster and Stone, *op. cit. supra*, note 93, pp. 291, 375.



## (2) The Contents of the Basic Policy

A close examination of the evidence makes it possible to suggest in certain respects a more precise statement of what the strict construction policy of the treason clause involves. In the first place, though the most obvious emphasis in discussion was upon limiting the power of the legislature to extend the scope of "treason", there can be no doubt that the restrictive policy was intended likewise to limit judges and to curb the creation of novel treasons by construction. This was certainly Wilson's intent. As defense counsel in the treason cases of 1778 he had strongly urged that courts should construe strictly the terms of treason statutes and take care not to extend the crimes there defined. In his December 7 speech to the Pennsylvania ratifying convention, he chose as an example of the perils of a loose extension of the offense one of the most cited instances of the "constructive" (i. e., judge-made) treasons of English law. In his law lectures, in 1790, he emphasized that the great advance made by the Statute of Edward III was to curb the power of the judges by reserving to Parliament the right to decide whether novel cases should be deemed treason, and his praise for the provision in the Constitution was that it improved the English situation by broadening the limitation to cover the legislature as well.<sup>105</sup> There would seem significance in the fact that the Committee of Style

<sup>105</sup> On the issue of whether by acting as city gatekeeper by appointment of the British, Carleton had, within the meaning of the Pennsylvania act, taken a "commission" from the enemy, Wilson cited Blackstone for the strict construction of penal statutes. 7 Pennsylvania Archives,

shifted the treason clause out of Article I into Article III in the final shaping of the document; the matter of the scope of the offense had been so clearly taken from Congress that it was logical to place the remaining admonition of policy in the part of the document dealing with the courts, which must still administer the clause.<sup>104</sup> In 1792, Mr. Justice Iredell, who, we have seen, had cited the treason clause in support of the Constitution in the North Carolina convention, viewed it as preventing the punishment of "constructive acts of treason".<sup>105</sup>

Though the restrictive policy was taken to limit judges as well as legislators, the treason clause

*op. cit. supra*, note 35, p. 59. The English case referred to is that of the slain buck, note 93, *supra*. In addition to the quotations, note 94, *supra*, see the references to the "uncertain and ambiguous" state of the common law of treason, and to Hale's praise for "the great wisdom and care of the parliament, to keep judges within the bounds and express limits of this statute, and not to suffer them to run out, upon their own opinions, into constructive treasons, though in cases which seem to have a parity of reason." *Lectures on Law*, 3 Works, *op. cit. supra*, note 94, pp. 96, 97.

<sup>104</sup> Cf. Warren, *The Making of the Constitution* (Boston 1928) 489-490.

<sup>105</sup> Charge Delivered to the Grand Jury for the District of Massachusetts, in the Circuit Court of the United States, Boston, October 12, 1792, 2 McRee, *op. cit. supra*, note 98, p. 368. Iredell was not yet displaying the extreme Federalist position which marked his charges to juries in later years, and his emphasis on the limitation of judge-made "treason" may fairly be taken to reflect a prevailing attitude of 1789. Compare his remarks in the pamphlet in answer to Mason's objections to the Constitution, note 98, *supra*.

used words of the Statute of Edward III upon which English judges had had much to say over centuries. Despite the condemnation of "constructive" treasons, in political polemics, it was also assumed that "levying war" or "adhering to enemies" would be construed in the light of previous application of these terms. Wilson, indeed, found in the judicial gloss upon the words of Edward III's statute one of the sources of protection against oppression. Though the Statute had been "like a rock, strong by nature", he noted that it had been "fortified, as successive occasions required, by the able and honest assistance of art," so as to stand "impregnable by all the rude and boisterous assaults, which have been made upon it, at different quarters, by ministers and by judges." These qualities had now been borrowed for the strengthening of the Constitution:

This single sentence comprehends our whole of national treason; and, as I mentioned before, is transcribed from a part of the statute of Edward the third. By those who proposed the national constitution, this was done, that, in a subject so essentially interesting to each and to all, not a single expression should be introduced, but such as could show in its favour, that it was recommended by the mature experience, and ascertained by the legal interpretation, of numerous revolving centuries.<sup>100</sup>

<sup>100</sup> Lectures on Law, 3 Works, *op. cit. supra*, note 94, pp. 99-100, see, to the same effect, 2 Story, Commentaries on the Constitution of the United States (2d ed. Boston, 1851) 540.

It is quite evident, moreover—nor, in view of the prominence of Shays' Rebellion in the minds of the Constitution's proponents, is this surprising—that it was assumed that to some ill-defined extent the constructive levying of war would be covered by the treason clause.<sup>107</sup> The evidence thus poses a most difficult problem, which it does not resolve. The omission from the constitutional clause of any provision analogous to that in English law which punished compassing the death of the king removed the foundation on which the English judges had built much of the reprobated structure of "constructive" treasons. It is a fair inference, in view of the vigor with which the restrictive policy of the Constitution emerges from the evidence, that it would violate that policy to import into our law English doctrine based on the omitted clause of the Statute of Edward III.

<sup>107</sup> See, e. g., discussions in the Federal Convention and the ratifying debates regarding the proposal to limit the President's power to pardon in cases of treason: 2 Farland, *op. cit. supra*, note 80, pp. 637, 639; 3 *id.* 127, 158, 218; 4 *id.* 39, 60. See also references to the guaranty of a republican form of government for the states and protection against insurrection: 2 *id.* 47-49; The Federalist, *op. cit. supra*, note 78, Nos. XXX and LXXIV (Hamilton); 2 Elliott, *op. cit. supra*, note 78, pp. 430, 520-521; 3 *id.* 497, 498; 4 *id.* 20, 96, 112, 195, 220; cf. terms of amendments proposed in ratifying conventions: 1 *id.* 325, 326 (disarming citizens), 327, 328, 334, 335; 2 *id.* 542, 546; 3 *id.* 657-658; 4 *id.* 245, 249 (martial law in time of insurrection). Cf. Charge of Mr. Justice Story on the Law of Treason, Delivered to the Grand Jury of the Circuit Court of the United States, Holden at Newport, for the Rhode-Island District, June 15, 1842 (Providence: Printed by H. H. Brown, 1842), Fed. Cas. No. 15,275, 30 Fed. Cas. 1046.

Even so, there were in English history ingenious constructions under those clauses of the Statute which the Constitution did adopt, and if the full gloss is to be taken with the clauses, the limiting value attributed to the use of the familiar words might be considerably depreciated. The problem is made the more difficult, because in England indictments often contained counts under both the charges of compassing the king's death and levying war against him, or adhering to his enemies; and broad rulings of the courts did not draw distinctions as to the relative scope of these different charges. All that can be said is that, so far as the contemporary materials are concerned, their weight is clearly in favor of resolving doubts on the side of precise definition of the offense. Obviously this is the point of Wilson's law lectures.<sup>100</sup>

It seems possible, finally, to cast some light on the particular type of oppression which the proponents of the treason clause feared under loose definitions of the offense. Aside from what may be implied in Dr. Franklin's reference to the "violence" of prosecutions for treason as creating the danger of perjured evidence, the data suggest that the fear most in mind was of abuse of "treason" for the building or upholding of domestic political faction, rather than its vin-

<sup>100</sup> Note 106, *supra*. Compare the same problem as posed by Jefferson's use of the terms of Statute Edward III in his proposed revision of the Virginia criminal code, note 42, *supra*; Foster, 217-218, evidently felt that the mingling of charges of compassing and adhering did not serve to limit the authority of decisions regarding the scope of the latter charge. Compare, however, S. Holdsworth, H. E. L. (2d ed. London 1937) 318.

dictive use under wartime hysteria against "enemies". This is not the same thing as to draw a line between the offenses of levying war and adhering to enemies, and to apply a policy of strict construction only to the former. Though limited to wartime, the latter offense might obviously then be put to oppressive use against political foes or restless classes by the familiar technique of holding them to the "natural consequences" of their conduct.<sup>100</sup> What is suggested is that the historic policy restrictive of the scope of "treason" under the Constitution was most consciously based on the fear of extension of the offense to penalize types of conduct familiar in the normal processes of the struggle for domestic political or economic power. The sale of provisions to an enemy in wartime, or the conveying of intelligence to him, or the proffer of counsel and assistance to his agents, are types of conduct quite distinct from activities of a sort which political-opponents or economic groups would normally resort to in their efforts to influence public policy. There is less danger that charges of this type could, in view of the sharply defined character of the conduct in question, be used to suppress free competition for the power to direct the policies of the republic. It is not that the offense of adhering to enemies is, *in toto*, exempt from the restrictive policy of the Constitution, but that that policy was formed with attention directed at only

<sup>100</sup> Cf. McKinney, *Treason under the Constitution of the United States*, (1918) 12 Ill. L. Rev. 381; Warren, *What is Giving Aid and Comfort to the Enemy?* (1918) 27 Yale L. J. 331.



certain types of the conduct which might constitute adherence.<sup>110</sup>

There is little that is helpful in developing this point in the Convention discussion. It is worth recalling, however, that, when the proposal to require "two witnesses to the same overt act" was laid before the Committee of the Whole, following Franklin's expression of fear over the "virulence" of prosecutions for treason and the ease with which perjury was used against innocence, James Wilson commented that

much may be said on both sides. Treason may sometimes be practised in such a manner, as to render proof extremely difficult—as in a traitorous correspondence with an Enemy.<sup>111</sup>

Wilson apparently voted in favor of the more strict two-witness requirement, but this vote on the evidentiary safeguard does not necessarily limit the implications of his suggestion of a stronger hand in defining the offense of trafficking with the enemy. In the debate in the Pennsylvania ratifying convention, it is a reasonable implication that Wilson is concerned for suppression of essentially political conduct, when he exclaims

Crimes against the state! and against the officers of the state! History informs us that more wrong may be done on this subject than on any other whatsoever.

<sup>110</sup> The concern shown in the Convention discussion that the phrase regarding "aid and comfort" be added to "adhering" in order to limit the latter, shows that a theory of a wholesale liberal construction of this offense is not supportable. See note 86, *supra*.

<sup>111</sup> 2 Farrand, *op. cit. supra*, note 80, p. 348.

When he cited a case to illustrate the excesses of the English law of "constructive" treason, it was one in which the charge had been domestic disloyalty to the king, "compassing the death of the king." Moreover, he argued that there was no special reason to fear governmental oppression where the government did not have separate interests from the people—which would be the case as regards protection against actual dealings with the enemy—and then adduced the treason clause to show that "Whenever the general government can be a party against a citizen, the trial is guarded and secured in the Constitution itself. \* \* \* In this context, his caution that

If we have recourse to the history of the different governments that have hitherto subsisted, we shall find that a very great part of their tyranny over the people has arisen from the extension of the definition of treason

is properly read as aimed at cases where the government and people might have separate interests: i. e., where the real issue was the control of domestic power.<sup>112</sup>

The abuses which the pamphleteers believed defeated by the Constitution's treason clause seem most likely to have been the suppression of political opposition or the legitimate expression of views on the conduct of public policy. The dan-

<sup>112</sup> See notes 92 and 93, *supra*; Lectures on Law, 3 Works, *op. cit. supra*, note 94, pp. 96, 98, 99. It should be remembered, however, that as counsel for the defense in the *Coffin* case in 1778, Wilson had argued for a strict construction of the Pennsylvania statute defining adherence to the enemy. See notes 35, 42 and 103, *supra*.

ger pointed to by Madison in *The Federalist* was that

new-fangled and artificial treasons have been the great engines by which violent factions, the natural offspring of free government, have usually wreaked their alternate malignity on each other. \* \* \* 113

References in other discussions to the protection offered by the treason clause against the "avarice and rapacity of government," to its "truly republican" character and its "pre-eminence in the scale of political security," likewise imply primary attention to the use of the offense against normal activities of political opposition and opinion.<sup>114</sup> In 1808, Rufus King, who had figured prominently in the work of the Federal Convention, wrote to Pickering commenting on the bill introduced by Senator Giles to correct the gaps in the law which it was conceived, had permitted Burr to escape conviction. King's remarks are, of course, prompted by his ardent anti-Jeffersonian position, but his opinion of the history of the policy informing the treason clause so tallies with the contemporary evidence as to deserve note:

The limitation which the Constitution establishes on the subject of Treason, proceeded from a principle, which will readily be approved by every man who is acquainted with the vindictive spirit that, at different times in the History of England,

<sup>113</sup> *Loc. cit. supra*, note 95. Cf. *id.* No. LXXIV, (Hamilton), 4 Tucker, *op. cit. infra*, note 120, pp. 40-41.

<sup>114</sup> The quotations are from Iredell, note 98, *supra*; "Cassid," note 97; *supra*; and Hartley, note 102, *supra*. Cf. Grand Jury charges of Iredell, J., in 2 McRee, *op. cit. supra*, note 98, pp. 391 (1793), and 468 (1796).

has animated the ascendant faction against their political adversaries. If the proposed law on the subject of Treason neither enlarges nor lessens its constitutional definition, the law is unnecessary; if it does the one or the other, it is unconstitutional. In the unfortunate periods, during which a country is torn by contending factions, the Treason Laws should not be altered. Neither ought they to be changed just at the time when the Govt. is angry or disappointed in the failure to convict such as are believed to have committed Treason. \* \* \* \* \*

### (3) Elements of the Offense

The materials for the period of the Constitution cast little light on detailed problems of the elements of "treason." Aside from the refer-

<sup>105</sup> 5 King, *Life and Correspondence of Rufus King* (N. Y. 1898) 73-75. Compare Hamilton's opinion against the radical treason act proposed by Lloyd in 1798, in a letter of June 29, 1798, to Wolcott: "Let us not establish a tyranny. Energy is a very different thing from violence." 3 Adams, *History of the United States* (N. Y. 1898) 468, after noting that laymen might think Marshall could have reached another result in some of his rulings in the Burr trial, if he had so chosen, comments

On the other hand, the intent of the Constitution was clear. The men who framed that instrument remembered the crimes that had been perpetrated under the pretence of justice; for the most part they had been traitors themselves, and having risked their necks under the law they feared despotism and arbitrary power more than they feared treason. No one could doubt that their sympathies, at least in 1788, when the Constitution was framed, would have been on the side of Marshall's decision. If Jefferson, since 1788, had changed his point of view, the chief justice was not under obligations to imitate him.

ences to the Statute of Edward III, there is no mention in the Convention's discussion of the idea that use of the word "treason" of itself imported any particular doctrines; though obviously it was used to express the central concept of betrayal of allegiance. The idea of "allegiance" itself receives no exposition, however. "Treason" also bears the implication that a specific intent to betray must be shown, and though there is no direct evidence on the point, the whole emphasis on a policy of strict construction in defining the offense reinforces the normal implication of the language.

Though the constitutional provision is phrased somewhat backhandedly on the point, it is clear from the development of the section that the overt act is intended as a distinct element of proof of the offense in addition to intent. This would seem at least clearly to rule out treason prosecutions for the mere holding of dissident opinions.<sup>116</sup> An effort, by violence, to resist the general execution of the laws, however, would apparently be viewed by the proponents of the treason clause as sufficient to make out a levying of war.<sup>117</sup> "Traitorous" correspondence with the enemy would establish adherence to him.<sup>118</sup> Beyond these scant items, the constitutional record gives us no specific help.

The sequence of amendments by which the evidentiary clause was strengthened clearly shows a strongly felt policy to be involved. What that policy aimed at seems quite simple. Franklin

<sup>116</sup> See Spaight, note 101, *supra*.

<sup>117</sup> See note 107, *supra*.

<sup>118</sup> Note 111, *supra*.

feared that the government would procure perjured witnesses, and evidently felt that the requirement as written would make this task more difficult. This explanation was the accepted basis of the clause. If any more specific history explains the reason for placing the evidentiary requirement in the Constitution, there seems no evidence of it.

In the Act of April 30, 1790, Congress substantially restated the language of the constitutional provision and, exercising its power to fix the penalty, decreed death. There is no record of any discussion concerning this first federal treason statute which casts light on contemporary views of the constitutional provision.<sup>110</sup> Contem-

<sup>110</sup> 1 Stat. 112, Ch. IX. The penalty provision was subsequently modified by the addition of alternative penalties of fine and imprisonment. The Journal of Senator Maclay (Harris ed. Harrisburg, 1880) 128, 129, 158, 163, 164, 165, records stages in the passage of the bill containing the treason section, through the Senate. He notes that there was little debate on any aspect of the bill and records no mention of the treason section.

By the Act of September 6, 1788, Ch. VI, the Governor and judges of the Northwest Territory adopted a "Law respecting Crimes and Punishments" which declared the offense of treason against the United States and against the territory, in terms reminiscent of the Revolutionary period, and in several respects probably in excess of the constitutional provision (conspiracy included; no evidentiary provision). See *The Laws of the Northwest Territory, 1788-1800* (Pease ed. Illinois State Historical Library, Springfield, 1925), 17 Collections of Illinois State Historical Library, Law Series, Vol. I, p. 13; cf. p. 322. The territorial laws were so obviously inartistic, however, that this act cannot be taken seriously as a contemporary exposition of what crimes might be defined under the constitutional provision.



porary treatises drew their statements on the specific incidents of treason from English decisions and the early 19th century American decisions, but found no further enlightenment in the constitutional materials. All emphasize, however, the fundamentally restrictive policy represented in the constitutional provision.<sup>120</sup>

## 2. TREASON UNDER THE CONSTITUTION

Such doctrinal development as there is concerning "treason" after the adoption of the Constitution is contributed primarily by the judges; treatise

<sup>120</sup> See Tucker's Blackstone's Commentaries with Notes of Reference, to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia (Philadelphia, 1803) 73, n. 1; 75, n. 2; 76, n. 3; App., Note B, pp. 11, 16-17, 39, 40-41; Rawle, A View of the Constitution of the United States (2d ed. Philadelphia, 1829) 139 ff.; Sergeant, Constitutional Law (Philadelphia, 1822) 367; 2 Story, Commentaries on the Constitution of the United States (2d ed. Boston, 1851) 539-540.

Rawle, however, does analyze the overt act element of the crime in a fashion which implies that the scope of the offense should be sufficiently broad to give preventative protection to the state, when he says (p. 141):

It is one of those crimes which may not be accomplished by single act; but, on the contrary, is in its very nature progressive, yet continuous. Robbery, murder, and many other crimes, are or may be effectuated in a short space of time, and when the body is deprived of life or the goods are taken from the spot, the perpetration of the guilt is full and entire; but the attempt to subvert a government is not a momentary act; combinations are formed, unlawful schemes devised and pursued; opposition is commenced and carried on, and the crime is ever the same; the protraction of time may

discussions are either scissors and paste-pot affairs, or horn-book recitations of question-begging generalities. The judges, however, shine mainly by comparison. In view of the great potentialities for good and evil in the instrument of treason prosecutions, it is surprising how little judicial imagination has been stirred to clarifying analysis in such cases as have presented themselves. The American cases serve little more than to annotate the doctrine, explicit or implicit, of the 17th and 18th century English treatises. Perhaps the explanation is that in the 19th century the executive and legislative branches took the creative initiative, by choosing no longer to employ the treason charge as the principal bulwark of state security. This is especially marked in the states; the trials of Thomas Dorr, and John Brown for treason by levying war against the states of Rhode Island and Virginia, respectively, seem to be the only completed treason prosecution by state authorities.

In their basic approach to the definition of "treason", the American cases have continued the ambiguous mingling of affirmation and restriction which marks the period of constitution making. Thus, on the one hand, the policy most frequently expressed in judicial opinions is that of careful restriction of the scope of the crime, pursuant to the wisdom of the framers. No opinion spells out precisely what form this restrictive policy should take: whether it merely bans the addition of new categories of subversive conduct to the two branches of

---

increase the terror and the injury, but in a legal view they do not enhance the guilt; in its outset it is deemed the highest crime that can be committed, and of course, no subsequent circumstances can raise it higher.

"treason" stated in the Constitution, or whether it limits the kinds of conduct which may be charged under either of those two branches. Thus some opinions simply praise the constitutional provision for giving "definite" meaning to the offense.<sup>1</sup> Others furnish a little more light, by undertaking to explain the reasons behind the restrictive policy, even if they continue vague as to the tangible forms of its application. Three explanations are advanced. That which most certainly links with familiar English doctrine, is the inherent danger of abuse by the authorities and intimidation of the citizens, if the contours of the crime are vague and ill-defined. This is a broader ground of policy than the more specific fear of use of "treason" prosecutions in the rough and tumble of domestic faction; and suggests a general public interest in a reasonable certainty about the extent of political crimes, so that men may speak and act their political roles with proper freedom. Speaking for the Court, in *Ex parte Bollman*, Mr. Chief Justice Marshall declared that

To prevent the possibility of those calamities which result from the extension of trea-

<sup>1</sup> See Chase, Circ. J., in Case of Fries, Fed. Cas. No. 5127, 9 Fed. Cas. 824, 930 (Circ. Ct. D. Pa. 1800) (second trial); Nelson, Circ. J., in Charge to Grand Jury, Fed. Cas. No. 18, 271; 30 Fed. Cas. 1034, 1035 (Circ. Ct. S. D. N. Y. 1861); *Stephan v. United States*, 133 Fed. (2d) 87, 90 (C. C. A. 6th, 1943), cert. den. 319 U. S. 781; argument of Sitgreaves, for the prosecution, and Ewing and Lewis for the defense, in the first trial of Fries, Fed. Cas. No. 5126, 9 Fed. Cas. 826, 847-848, 887, 895-896 (Circ. Ct. D. Pa. 1799); argument of William Pinkney, for defense, in *U. S. v. Hodges*, Fed. Cas. No. 15,374, 26 Fed. Cas. 332 (Circ. Ct. D. Md. 1815).

son to offences of minor importance, that great fundamental law which defines and limits the various departments of our government, has given a rule on the subject both to the legislature and the courts of America, which neither can be permitted to transcend.

Charging the Grand Jury in the Massachusetts District, Mr. Justice Curtis found the Statute of Edward III to have been "enacted \* \* \* mainly for the purpose of restraining the power of the crown to oppress the subject by arbitrary constructions of the law of treason."<sup>2</sup> In a contemporaneous Grand Jury charge, directed to problems arising out of mob resistance to execution of the Fugitive Slave Law, Sprague, D. J., made more explicit the conflicting interests of security and free discussion and political action:

Discussion is free. Men of all classes and of every shade of opinion may, by argument or even declamation addressed to the reason or the passions, endeavor to impress new views upon the public mind. But if, in their opposition to the expressed will of society, they pass from words to deeds, and

<sup>2</sup> 4 Cranch 75, 125-126, 2 L. Ed. 554, 571 (U. S. 1807). Compare, to similar effect, the charge to the jury by Livingston, Circ. J., in *U. S. v. Horie*, Fed. Cas. No. 15,407, 26 Fed. Cas. 397, 398, 402, 403 (Circ. Ct. D. Vt. 1808).

<sup>3</sup> Fed. Cas. No. 18,269, 30 Fed. Cas. 1024, 1025 (Circ. Ct. D. Mass. 1851). Compare, to similar effect, the charge of Field, Circ. J., in *U. S. v. Greathouse*, Fed. Cas. No. 15,254, 26 Fed. Cas. 18, 21 (Circ. Ct. N. D. Cal. 1863); charge to the Grand Jury, by Nelson, Circ. J., Fed. Cas. No. 18,271, 30 Fed. Cas. 1034, 1035 (Circ. Ct. S. D. N. Y. 1861); charge to the Grand Jury, by Leavitt, D. J., Fed. Cas. No. 18,272, 30 Fed. Cas. 1036 (Circ. Ct. S. D. Ohio, 1861).

embody mischievous doctrines into criminal acts of resistance to law, whoever they may be, and whatever may be their position or their ultimate purposes, they must sooner or later find that the law is irresistible and overwhelming.<sup>4</sup>

So Judge Mayer, charging the jury in *United States v. Fricke*, saw in the overt act requirement of the crime a safeguard against convicting a man simply for beliefs, opinions and emotional leanings, and phrased this in terms broad enough to imply a general underlying policy concerning the scope of the offense.<sup>5</sup> And, in criticism of the scope of application of the Espionage Act in *Schaefer v. United States*, Brandeis, J., found it natural to turn for comparison to precedents which he had deemed outlawed by the policy of the treason clause:

To prosecute men for such publications reminds of the days when men were hanged for constructive treason. And, indeed, the jury may well have believed from the charge that the Espionage Act had in effect restored the crime of constructive treason.<sup>6</sup>

<sup>4</sup> Fed. Cas. No. 18,263, 30 Fed. Cas. 1015, 1016 (D. Mass. 1851); cf. charge by Leavitt, D. J., loc. cit. supra, note 3, p. 1037. Compare also the decision of the Attorney General not to prosecute the leaders of the Pittsburgh meeting of September 7, 1791, though the resolutions there adopted criticizing government policy and petitioning Congress and the state legislature were a significant step in the unrest which culminated in the "Whisky Rebellion". (Note) 26 Fed. Cas. 499, 501, 503.

<sup>5</sup> 259 Fed. 673, 677 (S. D. N. Y. 1919).

<sup>6</sup> 251 U. S. 466, 493 (1920) (Holmes, J., concurring). Compare *Haywood v. U. S.*, 268 Fed. 795, 799-800 (C. C. A. 7th, 1920), cert. den., 256 U. S. 689, ruling that forcible

This thread of insistence on a policy against vagueness in the definition of the crime, in the interest of individual security and free give-and-take in community life, comes up to World War II in the charge to the jury in *United States v. Stephan*:

From a reading of the Constitution, it is apparent that our forefathers mentioned treason, specifically because they were anxious to limit things. They wanted to fix it so Congress could not go too far. Our forefathers had all lived under governments in which the law had been oppressive to them. That is why they were making the United States, because they wanted to get free from oppressive governments and have a democ-

interference with operations of producers from whom the government was expecting to buy or had contracted to buy war supplies or any other supplies in war or peace, is not a forcible prevention of the execution of acts of Congress within the meaning of the general conspiracy act.

How are the laws of the United States executed? By officials upon whom the duty is laid. Performance of that duty cannot be delegated. Producers, who have contracts to furnish the government with supplies, are not thereby made officials of the government. Defendants' force was exerted only against producers in various localities. Defendants thereby may have violated local laws. With that we have nothing to do. Federal crimes exist only by virtue of federal statutes; and the law-makers owe the duty to citizens and subjects of making unmistakably clear those acts for the commission of which the citizen or subject may lose his life or liberty. Section 6 should not be enlarged by construction. Its *prima facie* meaning condemns force only when a conspiracy exists to use it against some person who has authority to execute and who is immediately engaged in executing a law of the United States.



racy, a government under which they could enjoy what they believed to be true liberty and have true opportunity, so they limited the things that Congress could do \* \* \* they were thinking about fixing it so that Congress couldn't make any old thing treason \* \* \* they wanted to have a law against treason, but at the same time they didn't want Congress to be able to make anything treason except the one thing they had in mind.

\* \* \*

Our forefathers did not want Congress to be able to take spitting in somebody's face, or anything of that kind, as being treason, so they tell the Congress itself what it is \* \* \*

[The two-witness requirement also] shows a tendency of the framers of the Constitution to protect the people of the United States against their own Congress, to be frank about it. They had lived under laws which were oppressive to them. They said, "We are going to create the United States of America, and we will fix it so that our own law-making body cannot make too heavy a burden for us to carry."

Mr. Chief Justice Marshall suggested a second rationale for the careful restriction of the scope of "treason" when he pointed out, in *Ex parte Bollman*, that

As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the

Quoted at 50 Fed. Supp. 740, note; cf. *id.* 743, note. This charge was approved in its entirety upon review of the conviction. *Stephens v. United States*, 135 F. (2d) 87, 99 (C. C. A. 6th, 1943), cert. den., 319 U. S. 781.

tribunal before which it is made, a deliberate and temperate inquiry. Whether this inquiry be directed to the fact or to the law, none can be more solemn, none more important to the citizen or to the government; none can more affect the safety of both.\*

In the light of the experience of World War I, the most likely danger of unjust accusations born and prosecuted out of the heat of public passion would seem to be that of an expansion of "treason" to cover unpopular opinions or attitudes.<sup>9</sup> In the nature of the case, there will normally be fewer occasions on which public prejudice can vent itself by accusing the wrong man for committing an undoubted act of treason. The suggestion made in *Ex parte Bollman* has been adopted in several cases, which, however, create some ambiguity by linking the protection against public passion primarily to the two witness-overt act provision of the treason clause.<sup>10</sup> Mingling, as it does, a substantive (overt act) and an evidentiary (two witnesses) safeguard, the objects of this provision are themselves somewhat ambiguous; but the cases stress more the danger of convicting the "wrong man" than of unduly expanding the concept of "treason." Thus in

\* 4 Cranch 75, 125, 2 L. Ed. 554, 571 (U. S. 1807). Cf. Charge to Grand Jury by Leavitt, D. J., Fed. Cas. No. 18,272, 30 Fed. Cas. 1036, 1038 (S. D. Ohio 1861).

<sup>9</sup> Cf. Chafee, *Free Speech in the United States* (Cambridge, 1942) 51-60.

<sup>10</sup> Charges to Grand Jury by Sprague, D. J., Fed. Cases Nos. 18,373 and 18,274, 30 Fed. Cas. 1039, 1042 (D. Mass. 1861, 1863).

*United States v. Haupt*, the Seventh Circuit Court of Appeals, stating that the charge of treason, in a time of national crisis, presents special dangers of unfair trials, linked this warning with a ruling that the trial court had abused its discretion in denying motions for severance of the trials of the several defendants after admission of much highly prejudicial evidence related only to some of the defendants.<sup>11</sup> On the other hand, the charge to the jury, in the earlier case of *United States v. Fricke*, relates the danger of injustice through public passion both to the hazards of undue ex-

<sup>11</sup> 136 F. (2d) 661, 671 (C. C. A. 7th, 1943), rev'g 47 Fed. Supp. 836 (N. D. Ill. 1942); see 47 Fed. Supp. 832. Significantly, the Seventh Circuit cited the *Bollman* case in connection with its warning. See *Chambers v. Florida*, 309 U. S. 227, 236 (1940), where the Court lists the two-witness requirement of the treason clause among the constitutional provisions there described as inserted "as assurance against ancient evils."

From the popular hatred and abhorrence of illegal confinement, torture and extortion of concessions of violation of the "law of the land" evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power.

It is of course natural that in an opinion dealing with violation of procedural guaranties, the Court should focus its attention solely on the procedural protection offered by the treason clause, yet, it may not be without significance that the protection afforded by the limiting definition of "treason" is ignored.

pansion of the scope of "treason" and of conviction of the wrong man:

Naturally, passion is high; patriotic men and women are concerned with the safety of their country; and in the excitement it is but human nature sometimes to lose sight of the calm requirements of the law, and convict, as the expression goes, on general principles; and so, to safeguard against anything of that kind, and in order to prevent the conviction of any man for what he had in his mind, as distinguished from what he did, the constitutional provision as to an overt act was inserted. \* \* \* An overt act in itself may be a perfectly innocent act standing by itself; it must be in some manner in furtherance of the crime. \* \* \* a person cannot be convicted of treason merely for having the intention in his own mind to adhere to and give aid and comfort to the enemy. This intention must be manifested by what is termed an overt act.<sup>12</sup>

There may be some reason to fear that public prejudice will play particularly upon prosecutions for adherence to the enemy, since the elements of the offense ensure that such prosecutions will spring out of wartime events, when general feeling is high.<sup>13</sup>

A more calculating use of the convenient vagueness of "treason" charges against foes in domestic factionalism may be, in contrast, the more likely abuse of the crime of levying war. In this aspect, a restrictive definition serves the policy of preserving the free, nonviolent competition of inter-

<sup>12</sup> 259 Fed. 673, 677 (S. D. N. Y. 1919) (Mayer, D. J.).

<sup>13</sup> See *U. S. v. Fricke*, *loc. cit. supra*, note 12; *U. S. v. Haupt*, *loc. cit. supra*, note 11; cf. charges by Sprague, D. J., note 10, *supra*.

ests in political, social, and economic life. With his characteristic capacity for casting out varied suggestive lines for doctrinal development, Mr. Chief Justice Marshall also had his word to say on this matter. Ruling on the motion for commitment of Burr, he saw the dangers of political faction as underlying the constitutional limits set to the crime of treason:

As this is the most atrocious offence which can be committed against the political body, so is it the charge which is most capable of being employed as the instrument of those malignant and vindictive passions which may rage in the bosoms of contending parties struggling for power. It is that of which the people of America have been most jealous, and therefore, while other crimes are unnoticed, they have refused to trust the national legislature with the definition of this.<sup>14</sup>

And in *United States v. Hoxie*, in his charge to the jury, Livingston, as Circuit Justice, declared that the Constitution had set carefully defined limits to the crime

with a jealousy on this subject, which a full knowledge of the excesses that had so often been committed in other countries by parties contending for dominion, was well calculated to excite. \* \* \* <sup>15</sup>

<sup>14</sup> *U. S. v. Burr*, Fed. Cas. No. 14,692a, 25 Fed. Cas. 2, 13 (Circ. Ct. D. Va. 1807).

<sup>15</sup> Fed. Cas. No. 15,407, 26 Fed. Cas. 397, 398 (Circ. Ct. D. Vt. 1808). This comment takes on particular emphasis because the charge as a whole so clearly reflects Livingston's sensitivity to the impeachment proceedings against Chase, J., for his "strong" expositions of the law of levying of war in the trial of Fries and his ardent expositions of the Alien and Sedition Laws to juries.

Moreover, after discounting the fervor of advocacy, it is still significant of a prevailing attitude towards the policy of the treason clause that in his answer to the impeachment charges brought against him, Mr. Justice Chase, used similar reasoning to justify his refusal to permit defense counsel in the trial of Fries to parade before the jury the excesses of the earlier English treason cases:

Is it perfectly clear that decisions made before that statute [25 Edw. III], 450 years ago, when England, together with the rest of Europe, was still wrapped in the deepest gloom of ignorance and barbarism; when the system of English jurisprudence was still in its infancy; when law, justice and reason, were perpetually trampled under foot by feudal oppression and feudal anarchy; when, under an able and vigorous monarch, everything was adjudged to be treason which he thought fit to call so, and under a weak one nothing was considered as treason which turbulent, powerful and rebellious nobles thought fit to perpetrate—is it perfectly clear that decisions made at such a time, and under such circumstances, ought to be received by the courts of this country as authorities to govern their decisions, or lights to guide the understanding of juries? Is it perfectly clear that decisions made in England, on the subject of treason, before the revolution of 1688, by which alone the balance of the English constitution was adjusted, and the English liberties were fixed on a firm basis; decisions made either during the curious civil wars, in which two rival families contended for the crown; when, in the vicissitudes of war,



death and confiscation in the forms of law, continually walked in the train of the victors, and actions were treasonable or praiseworthy, according to the preponderance of the party by whose adherents they were perpetrated; during the reigns of three able and arbitrary monarchs who succeeded this dreadful conflict, and relaxed or invigorated the law of treason, according to their anger, their policy, or their caprice; or during those terrible struggles between the principles of liberty, not yet well defined or understood on one hand, and arbitrary power insinuating itself under the forms of the constitution, on the other; struggles which presented at some times the wildest anarchy, at others the extremes of servile submission, and after having brought one king to the scaffold, ended in the expulsion of another from his throne? Is it clear that decisions on the law of treason, made in times like these, ought not only to be received as authorities in the courts of this country, but also to have great influence on their decisions? Is it clear that decisions made in England, as to what acts will amount to levying war against the king, personally, and not against his government, are applicable to the constitution and laws of this country? \* \* \* Is all this so clear, that a judge could not honestly and sincerely have thought the contrary? <sup>16</sup>

<sup>16</sup> See Note to Case of Fries (second trial), 9 Fed. Cas. 938; cf. argument of defense counsel in *U. S. v. Hanway*, Fed. Cas. No. 15,299, 26 Fed. Cas. 105, 117 (Circ. Ct. E. D. Pa. 1851).<sup>o</sup> In his charge to the jury in the Fries case, Chase had, however, confined himself to brief, opening praise for the constitutional definition and proof requirements (9 Fed. Cas. 924, 930); and the argument from the excesses of English treason trials which he prevented Lewis

Of the three policies thus advanced in various American opinions to explain the restrictive character of the constitutional treason clause, only the last has a cleareut counterpart in the English discussions. The general policy against vagueness in so important a crime and in favor of free speech and free pursuit of interests generally in the community was not articulated in the previous English materials. Protection of the accused individual against the waves of public passion is an aspect of the treason clause policy which seems to have been brought to the fore by the special rigor of the two-witness requirement in the United States Constitution. Of these three policies, it is, again, only that designed to curb the abuses of political faction which finds clear expression in the discussions attendant upon the framing and ratification of the Constitution. Even the brief comments in the Convention regarding insertion of the two-witness requirement—notably Dr. Franklin's warning of the peculiar "virulence" of treason prosecutions—imply more the peril of political abuse of the offense than the danger of public prejudice.

As we noted in dealing with the materials pertinent to the framing and ratification of the Constitution, the question of the relevance of English authorities to the construction of the terms borrowed from the Statute of Edward III blurs the and Dallas from making to the jury, seems to have been directed essentially to enlisting the jury's sympathies for the policy of curbing factional use of "treason" prosecutions. See, e. g., argument of Dallas on the first trial of Fries, 9 Fed. Cas. 826, 878, 883, 879-881; and argument of Lewis, id., 897-899.

lines of the restrictive policy of the constitutional provision. The words of the treason clause are obviously broad, and the need for interpretation inescapable in the face of the refusal of facts to fit into neat moulds.<sup>17</sup> But, the constitutional prohibition on creation of new "treasons" limits the courts as well as the Congress.<sup>18</sup> And, as the Burr trial demonstrates, this requires restraint not only in the adoption of offenses outside those defined in the Constitution, but also in the determination of the evidence which will suffice to make out the elements of adherence to enemies or levying of war.<sup>19</sup> In both respects the limits set by the Constitution might be evaded if the courts imported the full scope of English decisions interpreting and applying the Statute of Edward.

Counsel have sometimes argued, and judges have sometimes spoken, as if the policy of the Constitution required a wholesale refusal of any guidance from English authorities.<sup>20</sup> This ex-

<sup>17</sup> See charge to jury by Peters, D. J., in Case of Fries, Fed. Cas. No. 5126, 9 Fed. Cas. 826, 909 (Circ. Ct. D. Pa. 1799) (first trial); charge to jury by Livingston, Circ. J., in *U. S. v. Horie*, Fed. Cas. Nos. 15,407, 26 Fed. Cas. 397, 398 (Circ. Ct. D. Vt. 1808).

<sup>18</sup> *Ex parte Bollman*, 4 Cranch 75, 127, 2 L. Ed. 554, 571 (U. S. 1807); *U. S. v. Burr*, Fed. Cas. No. 14,692a, 25 Fed. Cas. 2, 13 (Circ. Ct. D. Va. 1807).

<sup>19</sup> See *U. S. v. Burr*, Fed. Cas. No. 14,692a, *loc. cit. supra*, note 18; *id.*, Fed. Cas. No. 14,693, 25 Fed. Cas. 55, 159.

<sup>20</sup> See Charge to Grand Jury, by Nelson, Circ. J., Fed. Cas. No. 18,271, 30 Fed. Cas. 1034, 1035 (Circ. Ct. S. D. N. Y. 1861); argument of Lewis for the defense, in Case of Fries, Fed. Cas. No. 5126, 9 Fed. Cas. 826, 897 (Circ. Ct. D. Pa. 1799) (first trial). Chase, Circ. J., refused to permit defense counsel to present to the jury in the second trial of Fries a picture of the extreme construc-

trene position is not, however, the law of the American opinions, which overwhelmingly assert the relevance of English constructions of the Statute of Edward III.<sup>21</sup> But, it is significant

tions given to the Statute of Edward III by English judges. Defense counsel then withdrew from the case. Subsequently, in response to a request by President Adams, Dallas and Lewis sent to the President a memorandum of the argument which they had proposed to make at the second trial. This included the statement that

As the spirit of the constitution is opposed to implied powers, and constructive expositions, we are bound to take the plain manifest meaning of the words of the definition, independent of any glossary which the English courts, or writers, may have affixed to the words of the English statute.

9 Fed. Cas. 948. Probably mindful of the fact that the impeachment of Chase rested in part on his refusal to let counsel argue this point, Livingston, Circ. J., noted the issue, but cautiously avoided it, in *U. S. v. Hoxie*, Fed. Cas. No. 15,407, 26 Fed. Cas. 395, 398 (Circ. Ct. D. Vt. 1808). Because he found that no treason had been committed in that case, even within the definitions of the English authorities, he found it unnecessary to decide whether they had any binding effect, or to

discuss a question which has been much agitated—whether, by the use of these terms, it was intended to adopt the technical meaning which they had already received in England: or whether, considering treason as a new offence against a newly created government, the constitution on this point was to be interpreted by itself, without reference to, or with the aid of any common law decisions whatever?

<sup>21</sup> Iredell, Circ. J., and Peters, D. J., in charges to the jury, Case of Fries, Fed. Cas. No. 5126, 9 Fed. Cas. 826, 909, 912; Marshall, Circ. J., in direction to the jury in *U. S. v. Burr*, Fed. Cas. No. 14,693, 25 Fed. Cas. 55, 159-160; Kane, D. J., in charge to Grand Jury, Fed. Cas. No. 15,276,

that in early opinions, close to the times and ideas of the framers, two limitations were suggested on the use of English materials. In the first place, it was suggested that English doctrine developed under charges of compassing the death of the king had no proper relation to cases arising under the constitutional provision which pointedly omitted any analogue of that branch of the Statute of Edward III. Thus in charging the jury in the first trial of Fries, Judge Peters found the greater part of the objection to the doctrine of "constructive treason" to be "totally irrelevant here.—The subject of them is unknown, and may it ever remain so, in this country. I mean the compassing the death of the king."<sup>22</sup> And in the second trial, the reporter notes the following exchange between counsel for the prosecution and the Circuit Justice:

Mr. Rawle was then producing an authority, when Judge Chase said, the court would admit, as a general rule, of quotations which referred to what constituted actual or constructive levying war against the King of Great Britain in his regal capacity; or, in

30 Fed. Cas. 1047, 1048 (Circ. Ct. E. D. Pa. 1851); Curtis, Circ. J., in charge to Grand Jury, Fed. Cas. No. 18,269, 30 Fed. Cas. 1024, 1025; Cadwalader, D. J., in *U. S. v. Greiner*, Fed. Cas. No. 15,262, 26 Fed. Cas. 36, 38 (E. D. Pa. 1861; Field, Circ. J., in charge to jury in *U. S. v. Greathouse*, Fed. Cas. No. 15,254, 26 Fed. Cas. 18, 21 (Circ. Ct. N. D. Cal. 1863); Sprague, D. J., in charge to Grand Jury, Fed. Cas. No. 18,273, 30 Fed. Cas. 1039 (D. Mass. 1861); *U. S. v. Cramer*, 137 F. (2d) 888, 894 (C. C. A. 2d, 1943); cf. *Druecker v. Salomon*, 21 Wis. 621, 626 (1867).

<sup>22</sup> Fed. Cas. No. 5,126, 9 Fed. Cas. 826, 909 (Circ. Ct. D. Pa. 1799).

other words, of levying war against his government, but not against his person; because it was of the same nature as levying war against the United States ~~would be applied~~ here [sic]; so was that part called adhering to the king's enemies:—they may, any of them, be read to the jury, and the decisions thereupon—not as authorities whereby we are bound, but as the opinions and decisions of men of great legal learning and ability. But even then, the court would attend carefully to the time of the decisions, and in no case must it be binding upon our juries.<sup>23</sup>

Mr. Justice Chase's remarks suggest the second limitation which the early American authorities would place upon the use of English precedents.<sup>24</sup> In the first Eries trial, Mr. Justice Iredell informed the jury that

\* \* \* as these able and learned framers of our constitution borrowed the act, in terms, from the British statute alone, an authority with which they were familiar, \* \* \* they certainly at least meant that the English authorities and definition of those terms should be much respected. Those gentlemen knew as well as any counsel at the bar, the danger of constructive

<sup>23</sup> Fed. Cas. No. 5127, 9 Fed. Cas. 924, 927 (Circ. Ct. D. Pa. 1800); see also in the answer filed by Chase, J., to his impeachment, *id.*, 938.

<sup>24</sup> His views on the exclusion of English precedents antedating 1688 are set forth in great detail in that part of his answer to the impeachment charges, quoted at note 16, *supra*. That the impeachment of Chase did not rest on objections to these doctrines, but on his preventing counsel arguing them to the jury, see 11 *American State Trials* (Lawson, ed. St. Louis, 1916) 197, 241, 242, 272, 316, 345, 351.



treasons; they knew how to guard themselves against the bad times of English history, and were equally acquainted with the better and more modern decisions. Would it not have been natural for men so able, so wise, so cautious of their liberties, had they entertained a doubt of their insufficiency, to have introduced some new guards, some new interpretations, and not to have left us in later time in the dark, exposed to so much danger as the gentlemen of the bar apprehend? Gentlemen who know anything of that country, know that arbitrary times have existed, and also that a number of decisions have taken place since that period. I do not believe that any judge since the revolution in England has ever considered that he was bound to follow every arbitrary example of the English courts, or the crown laws which had taken place in dark ages \* \* \*

In 1851, in directing a verdict of acquittal of the charge of levying war by participating in forcible resistance to execution of the Fugitive Slave Law, Mr. Justice Grier told the jury that in the interpretation of the treason clause, English decisions and treatises "which we know that the framers of our constitution would regard as the standard authorities in questions of legal definition" might

<sup>25</sup> Fed. Cas. No. 5126, 9 Fed. Cas. 826, 912 (Circ. Ct. D. Pa. 1799). Likewise, Peters, D. J., in charging the jury, asserted the relevance of English precedents dating since the "bad times". *Id.*, 909. As Iredell's remarks indicate, these instructions were directed against the defense argument, which had vividly depicted the excesses of English treason law. See note 16, *supra*.

be looked to; but he indicated that the earlier English authorities were of dubious value:

Since the adoption of the constitution but few cases of indictment for treason have occurred, and most of them not many years afterwards. Many of the English cases, then considered good law and quoted by the best text writers as authorities, have since been discredited, if not overruled, in that country. The better opinion there at present seems to be, that the term "levying war" should be confined to insurrections and rebellions for the purpose of overturning the government by force and arms. Many of the cases of constructive treason quoted by Foster, Hale, and other writers, would perhaps now be treated merely as aggravated riots or felonies. But for the purposes of the present case, it is not necessary to pursue this subject further, or to look beyond the cases decided in our own country. The subject is one of too serious importance to allow this court to indulge in speculations, or wander from the safe path of precedent.<sup>26</sup>

Occasion has not presented itself for later courts to develop or deny these suggested doctrinal limi-

---

<sup>26</sup> *U. S. v. Hanway*, Fed. Cas. No. 15,299, 26 Fed. Cas. 105, 127 (Cir. Ct. E. D. Pa. 1851). Though he does not make clear how far he would carry his strong condemnation of the incorporation of English judicial constructions of the words of Edward III's Statute into the constitutional definition, Tucker would probably agree substantially with the soundness of distinguishing the earlier and later English decisions thus, as guides to policy. See 5 Tucker's Blackstone's Commentaries with Notes of Reference, to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia (Philadelphia, 1803), §5, n. 18, App. Note "B", pp. 13, 40-41, 46.

tations on the adoption of English treason authorities. They seem consistent with the restrictive policy evidenced in the terms and history of the constitutional provision, and with the generally conservative approach taken by almost all of the American opinions in expounding the law. The impeachment of one of their chief exponents does not cast doubt on their validity, for the charge levelled in this connection against Mr. Justice Chase was not that his distinction of the early English cases was inherently arbitrary or unreasonable, but that he denied counsel opportunity to make their own statement of that law to the jury. The impeachment of Chase was, moreover, too clearly partisan to carry weight on a professional matter; and in any case the Justice was acquitted. The persistence of this stated policy of strict construction of the scope of "treason" is an element of continuity between the decisions and the materials seen in the period of the framing and adoption of the Constitution. It appears less in opinions and charges of the later years, but concern for the counter value of national security has never yet reached the point at which a court has openly repudiated the limiting policy. As the foregoing recital shows, the courts have been more ready to state reasons which they have seen underlying the strict construction policy, than they have to explain what it means in concrete application. Nevertheless, though the reported decisions in treason trials are not numerous, when they are examined with a view to checking the practical reality of the restrictive policy, the preponderance of acquittals and of specific rules laid down with careful regard to the protection of the accused

indicates that the restrictive policy has expressed an operative attitude and not merely a pious hope.<sup>27</sup> Specific intent has been quite rigorously

<sup>27</sup> Omitting Grand Jury charges and cases in which the enunciation of doctrines of the law of treason figured only incidentally one may list from the American materials 35 instances in which application of the law of treason as defined in the Federal Constitution may be said to have been in question. Classifying these cases, with reference to the vigor of the rules laid down against "treason", as "strong" (\*), "moderate" (\*\*), and "restrictive" (\*\*\*), one emerges with nine instances in which "strong" doctrine is pronounced, two of these in the present war. In the following list, the cases are classified according to the asterisk symbols set out in the preceding sentence.

\* Whiskey Rebellion cases: *U. S. v. Vigol*, Fed. Cas. No. 16,621, 28 Fed. Cas. 376 (Circ. Ct. D. Pa. 1795); *U. S. v. Mitchell*, Fed. Cas. No. 15,788, 26 Fed. Cas. 1277. Constructive levying of war, based on forcible resistance to execution of a single statute; defendants were convicted and later pardoned.

\* House tax case: *Case of Fries*, Fed. Cas. Nos. 5126, 5127, 9 Fed. Cas. 826, 924 (Circ. Ct. D. Pa. 1799, 1800). Constructive levying of war by forcible resistance to execution of a single statute; defendant was convicted and later pardoned, as were defendants convicted in other (unreported) prosecutions. In *U. S. v. Marks*, 11 American State Trials (Lawson ed. St. Louis 1916) 175 (Circ. Ct. D. Pa. 1800), the jury was charged on the law of treason as in the other cases, but defendant was acquitted. He later plead guilty to a charge of conspiracy. Defendants Gettman and Hainey were found guilty, however, on a charge to the jury similar to that in the Fries case. Stähler was acquitted, and nolle pros. was entered regarding Desch and Klein, who were held for conspiracy. Carpenter, *The Two Trials of John Fries* (Philadelphia, 1800) 210-211.

\*\*\* *Burr conspiracy: Ex parte Bollman*, 4 Cranch 75, 2 L. Ed. 554 (U. S. 1807); *U. S. v. Burr*, Fed. Cas. Nos. 14,692a and 14,693 (Circ. Ct. D. Va. 1807). Conspiracy

insisted on, though the existence of mixed motives has not sufficed to acquit. The authority seems to weigh against requiring that the overt acts be such as evidence intent; but, in any event, there

to levy war not within constitutional definition as an overt act of levying war; actual assemblage required. Discharge of prisoners ordered in *Bollman* case; verdict directed in the *Burr* trial.

\*\**U. S. v. Lee*, Fed. Cas. No. 15,584, 26 Fed. Cas. 907 (Circ. Ct. D. C. 1814): Sale of provisions a sufficient overt act; mixture of commercial motive does not make intent sufficient. Acquittal.

\*\**U. S. v. Hodges*, Fed. Cas. No. 15,374, 26 Fed. Cas. 332 (Circ. Ct. D. Md. 1815). Obtaining release of prisoners to the enemy is adhering to the enemy; the act shows the intent. Acquittal.

\*\*\**U. S. v. Hoxie*, Fed. Cas. No. 15,407, 26 Fed. Cas. 397 (Circ. Ct. D. Vt. 1808). Organized, armed attack of smugglers on troops enforcing embargo is riot, and not constructive levying of war. Directed verdict.

\*\*\**U. S. v. Pryor*, Fed. Cas. No. 16,096, 27 Fed. Cas. 628 (Circ. Ct. D. Pa. 1814). Proceeding under flag of truce with enemy detachment to help buy provisions is too remote an act to establish adhering to the enemy. Directed verdict.

\*\*\**U. S. v. Hanway*, Fed. Cas. No. 15,299, 26 Fed. Cas. 105 (Circ. Ct. E. D. Pa. 1851). Participation in forcible resistance to execution of Fugitive Slave Law not constructive levying of war in absence of showing of preconceived plan. Directed verdict.

\*\**U. S. v. Greiner*, Fed. Cas. No. 15,262, 26 Fed. Cas. 36 (E. D. Pa. 1861). Participation as member of state militia company in seizure and holding of a Federal fort for the state is a levying of war sufficient to justify binding accused over to await trial when federal court again sits in the rebel area.

\*\**U. S. v. Greathouse*, Fed. Cas. No. 15,254, 26 Fed. Cas. 18 (Circ. Ct. N. D. Cal. 1863). Fitting out and sailing a privateer is levying of war. Defendants convicted, later

is a tendency to require a showing that defendant was in fact in a position to do harm. The two-witness requirement has been strictly applied. Per-

pardoned or released on bond upon taking oath of allegiance.

\*\*Cases of confiscation of property or refusal to enforce obligations given in connection with sale of provisions to the Confederacy. *Hannauer v. Doane*, 12 Wall. 342, 20 L. Ed. 439 (U. S. 1871); *Carlisle v. U. S.*, 16 Wall. 147, 21 L. Ed. 426 (U. S. 1873); *Sprott v. U. S.*, 20 Wall. 459, 22 L. Ed. 371 (U. S. 1874); *U. S. v. Athens Armory*, Fed. Cas. No. 14,473, 24 Fed. Cas. 878 (N. D. Ga. 1868). Mixed motive, involving commercial profit, does not bar finding of the giving of aid and comfort to the enemy. Other decisions in the Court of Claims are similar.

\*\**U. S. v. Catheart and Parmenter*, Fed. Cas. No. 14,756, 25 Fed. Cas. 344 (Circ. Ct. S. D. Ohio, 1864). Motion to quash and demurrer to indictments for treason by levying war denied and overruled, rejecting argument that the union is only a compact of states.

\*\**Chenoweth's Case*. [Unreported; see *Ex parte Vallandigham*, Fed. Cas. No. 16,816, 28 Fed. Cas. 874, 888 (S. D. Ohio 1863); 32 Cong. Globe, Pt. 3, pp. 2166-2167 (37th Cong., 2d Sess.)]: indictment held faulty for alleging aiding and abetting rebels, instead of charging directly the levying of war; in treason all are principals.

\**Druecker v. Salomon*, 21 Wis. 621 (1867). In action for false imprisonment, ruled that detention of defendant lawful because in participating in draft act riot he was guilty of levying war.

\*\*\*In the matter of *U. S. v. Pratt*, 1 Chi. Legal News 401 (1869): Charge of treason by forcing a U. S. guard and killing several persons in its custody is insufficient justification for detention of petitioners in habeas corpus.

\*\*\**Case of Jefferson Davis*, Fed. Cas. No. 3621a, 7 Fed. Cas. 63 (Circ. Ct. D. Va. 1867-1871). Strong arguments were made that treason charges could not properly be brought against those conducting a rebel government which had achieved the status of a recognized belligerent; though the position was not formally conceded, Davis was



haps the outstanding respect in which there has been an inclination to construe the crime broadly was regarding constructive levying of war; but since the

not eventually brought to trial on the indictment for treason. See 2 Warren, Supreme Court in United States History (Rev. ed. Boston, 1934) 485-487; Watson, Trial of Jefferson Davis, (1915) 25 Yale L. J. 669.

\*\*\*Philippine insurrections, *U. S. v. Magtibay*, 2 Philipp. 703 (1903); *U. S. v. De Los Reyes*, 3 Philipp. 349 (1904). Mere possession of rebel commissions insufficient overt act; defendants' power insufficient to show overt acts; strict enforcement of two-witness requirement. Convictions reversed. *U. S. v. Lagnason*, 3 Philipp. 472 (1904): armed effort to overthrow the government is levying war.

\**U. S. v. Fricke*, 259 Fed. 673 (S. D. N. Y. 1919). Acts "indifferent" on their face held sufficient overt acts where intent is shown.

\*\*\**U. S. v. Robinson*, 259 Fed. 685 (S. D. N. Y. 1919). Obiter, acts harmless on their face are insufficient as overt acts; two-witness rule requires two witnesses to acts involving commission of the offense. Directed verdict.

\**U. S. v. Werner*, 247 Fed. 708 (E. D. Pa. 1918), aff'd, 251 U. S. 466, 64 L. Ed. 360, 40 Sup. Ct. 209 (1919). Demurrer to indictment overruled; act indifferent on its face may be sufficient overt act.

\*\*\**U. S. v. Haupt*, 136 F. (2d) 661 (C. C. A., 7th, 1943). Strict application of two-witness requirement and of severance of trial where prejudicial evidence regarding some defendants has no proper bearing on others. Inferentially, however, approves acts harmless on their face as sufficient overt acts. Convictions reversed.

\**Stephen v. United States*, 133 F. (2d) 87 (C. C. A., 6th, 1943). Acts harmless on their face may be sufficient overt acts; firm ruling on intent. Conviction affirmed. Sentence commuted.

\**U. S. v. Cramer*, 137 F. (2d) 888 (C. C. A., 2d, 1943). Acts indifferent on their face may be sufficient overt acts. Conviction.

1850's that offense seems in practice to have become a dead-letter, as it has in England.

The language of the constitutional definition of treason does not point up the separate elements

\*\*\**U. S. v. Leiner*, S. D. N. Y. 1943 (unreported). Acts indifferent on their face are not sufficient overt acts; specific intent must be clearly shown. Directed verdict.

The only reported trials for treason against a state seem to be those of Thomas Wilson Dorr (Rhode Island) and John Brown (Virginia).

\*\*The Trial of Thomas Wilson Dorr, 2 American State Trials, *op. cit. supra*, p. 5 (R. I. Sup. Ct. 1844). Claim to head a state "government" created by extra-legal elections, enforced by armed effort to seize state arsenal. Defendant was convicted, but subsequently pardoned after serving several years in prison.

\*\*The Trial of John Brown, 6 American State Trials, *op. cit. supra*, p. 700 (Jefferson City, Circ. Ct. Va. 1859). Armed insurrection "to free slaves" is treason by levying war. Defendant was convicted and executed.

Certain abortive prosecutions for treason are worth noting.

\*Indictments were brought against Joseph Smith and other leaders of the Mormons for treason by levying war against the state of Missouri, in 1838; and again, Smith was arrested on such a charge of treason against the state of Illinois, in 1844. Both charges seem severe, since they followed a long history of mutual recrimination and violence between the Mormons and their neighbors; and it seems likely that on a fair trial a limited purpose of self-defense, rather than intent to set up a rival government, could have been made out. See 1 Williams and Snodemaker, *History of Missouri* (Chicago, 1930) 545; Culmer, *New History of Missouri* (Mexico, Mo. 1938) 212; 1 Roberts, *Comprehensive History of the Church of Jesus Christ of Latter-Day Saints* (Salt Lake City, 1930) 499, 500, 529, 530; 2 *id.* 254; Davis, *Story of the Church* (Independence, Mo., 1943) 244, 283, 305; Ford, *History of Illinois* (Chicago, 1854) 337; Pease, *The Frontier State*

of the offense as clearly as it might. In particular, it is unclear in its reference to the overt act, which at first reading might seem introduced merely as a required type of proof of other facts

(Springfield, 1918) 352; Sen. Doc. No. 189, 26th Cong., 2d Sess. (Feb. 15, 1841). The Missouri charge was not pressed at the time, for political reasons, and the defendants escaped, possibly with the connivance of their jailors; later efforts at extradition failed. Smith was murdered by a mob which took him from his cell shortly after his arrest in Illinois.

\*Indictments were brought against Mormon leaders for treason by levying war against the United States, in connection with activities taken to resist Federal troops, in Utah, in 1856-1857; but these charges were immediately nullified by the general pardon granted by President Buchanan. Even the official history of the Church recognizes that, "strictly speaking", there was a levying of war in this case. 4 Roberts, *op. cit. supra*, pp. 412-413, 425; see Anderson, *Desert Saints* (Chicago, 1942) 188.

\*Under a strongly partisan charge by the Chief Justice of Pennsylvania, who took the unusual action of addressing a local Grand Jury, indictments for treason by levying war against the state of Pennsylvania were returned in 1892 against leaders of the Homestead Strike. *Commonwealth v. O'Donnell*, 12 Pa. Co. 97 (O. & T. Allegheny Cty. 1892). The action was subjected to severe criticism, from conservative professional sources, as well as from labor sympathizers; and the prosecutions were quietly dropped after three of the defendants had been acquitted of charges of murder growing out of the clash with the Pinkerton detectives. See notes 110-112, *infra*.

There have also, of course, been many trials by military tribunals on charges amounting to treason: Apart from the issue of free speech involved in the Vallandigham case (\*) [see *The Trial of Clement L. Vallandigham*, 1 American State Trials (Lawson, ed. St. Louis, 1914) 699], the principal cases seem to have involved conduct clearly within strict definitions of the scope of "treason", and the principal issue has concerned the extent of mili-

constituting the crime.<sup>28</sup> It has been noted, however, that the constitutional history indicates that, consistent with familiar English doctrine, an overt act was intended to be shown as a separate and distinct element of the offense itself. Without material exception, the American opinions have so referred to the overt act, and to the intent, as distinct elements of the crime.<sup>29</sup> Typical of the

tary jurisdiction. See, e. g., regarding the "Northwest Confederacy conspiracy", Pitman, *The Trials for Treason at Indianapolis* (Cincinnati, 1865); Klaus, ed., *The Milligan Case* (N. Y. 1929) 24; Milton, *Abraham Lincoln and the Fifth Column* (N. Y. 1942) 170 and Ch. 8. Cf. *Ex parte Quirin*, 317 U. S. 1 (1942).

Charges of treason were found improperly laid against a state, where the accused was deemed to have acted rather against his allegiance to the United States, in *People v. Lynch*, 11 Johns. 549 (N. Y. 1814) (\*\*) and in *Ex parte Quirrier*, 2 W. Va. 560 (1866) (\*\*). The conduct involved was in each case within the most strict definition of treason.

<sup>28</sup> This difficulty was noted, and found not substantial, in a discussion of the elements of "treason", in *Wimmer v. U. S.*, 264 Fed. 11, 13 (C. C. A. 6th, 1920), cert. den. 253 U. S. 494 (Second Espionage Act).

The requirement that there shall be two witnesses is purely evidential, but when the requirement is extended to proof of the overt act, it becomes clear that there must be an overt act to contribute the crime, and the act is incorporated into the definition.

<sup>29</sup> Charge to jury by Paterson, Circ. J., in *U. S. v. Mitchell*, Fed. Cas. No. 15, 788, 26 Fed. Cas. 1277, 1280 (Circ. Ct. D. Pa. 1795); charge by Iredell, Circ. J., to Grand Jury in connection with Case of Fries, Fed. Cas. No. 5126, 9 Fed. Cas. 826, 840 (Circ. Ct. D. Pa. 1795); Peters, D. J., in colloquies with counsel on first trial of Fries, *id.*, 891 and 916; charge to jury by Iredell, Circ. J., in same, *id.*, 914; and by Peters, D. J., *id.*, 909; charge

approach is the charge to the jury by Paterson, Circuit Justice, in *United States v. Vigol*:

The first point for consideration is the evidence which has been given to establish the case stated in the indictment [in context, this refers to the overt act alleged]; the sec-

to jury by Chase, Circ. J., in second trial of Fries, Fed. Cas. No. 5127, 9 Fed. Cas. 924, 931 (Circ. Ct. D. Pa. 1800); *Ex parte Bollman*, 4 Cranch 75, 126, 2 L. Ed. 554, 571 (U. S. 1807); *U. S. v. Burr*, Fed. Cas. No. 14,692a, 25 Fed. Cas. 2, 13-14 (Circ. Ct. D. Va. 1807) (on motion to commit), and Fed. Cas. No. 14,693, *id.*, 55, 168, 169 (direction to jury); *U. S. v. Lee*, Fed. Cas. No. 15,584, 26 Fed. Cas. 907 (Circ. Ct. D. C. 1814); *U. S. v. Horie*, Fed. Cas. No. 15,407, 26 Fed. Cas. 397, 399, 400 (Circ. Ct. D. Vt. 1808); *U. S. v. Pryor*, Fed. Cas. No. 16,096, 27 Fed. Cas. 628, 630 (Circ. Ct. D. Pa. 1811); Story, Circ. J., in charge to Grand Jury, Fed. Cas. 18,275, 30 Fed. Cas. 1046 (Circ. Ct. D. R. I. 1842); Sprague, D. J., in charge to Grand Jury, Fed. Cas. No. 18,263, 30 Fed. Cas. 1015, 1016 (D. Mass. 1851); Kane, D. J., in charge to Grand Jury, Fed. Cas. No. 18,276, 30 Fed. Cas. 1047, 1048 (Circ. Ct. E. D. Pa. 1851); Grier, Circ. J., in charge to jury in *U. S. v. Hanway*, Fed. Cas. No. 15,299, 26 Fed. Cas. 105, 126 (Circ. Ct. E. D. Pa. 1851); *U. S. v. Greiner*, Fed. Cas. No. 15,262, 26 Fed. Cas. 36, 39 (E. D. Pa. 1861); Field, Circ. J., in charge to jury, in *U. S. v. Greathouse*, Fed. Cas. No. 15,254, 26 Fed. Cas. 18, 22 (Circ. Ct. N. D. Cal. 1863); Mayer, D. J., in charge to jury in *U. S. v. Fricke*, 259 Fed. 673, 677 (S. D. N. Y. 1919); Learned Hand, D. J., on motion to direct a verdict in *U. S. v. Robinson*, 259 Fed. 685, 690 (S. D. N. Y. 1919); *U. S. v. Werner*, 247 Fed. 708, 709-710 (E. D. Pa. 1918); trial court charge in *U. S. v. Stephan*, 50 Fed. Supp. 740, 742-743, note (E. D. Mich. 1943) [charge approved, 133 F. (2d) 87, 99 (C. C. A. 6th, 1943)]; *U. S. v. Cramer*, 137 F. (2d) 888, 893 (C. C. A. 2d, 1943); *U. S. v. Magtibay*, 2 Philipp. 703, 705 (1903); *U. S. v. De Los Reyes*, 3 Philipp. 349, 351 (1904); In Riots of 1844 (charge to

and point turns upon the criminal intention of the party; and from these points, the evidence and the intention, the law arises. With respect to the evidence, the current runs one way. \* \* \* [summarizing the assembling in force, marching, etc.] \* \* \*

Grand Jury by King, P. J.), 4 Pa. Law Jour. Rep. 293, 35, quoted also at 26 Fed. Cas. 116.

Two cases deviate from the standard distinction of the intent and act elements of the crime. In *U. S. v. Hodges*, Fed. Cas. No. 15,374; 26 Fed. Cas. 332 (Circ. Ct. D. Md. 1815), defendant was indicted for adhering to the enemy by procuring the release of British prisoners by his fervent representations to the guards of British threats to burn his home village in retaliation. Both Duval, Circ. J., and Houston, D. J., agreed that the judgment on the law as well as on the facts was for the jury. But in his charge, Mr. Justice Duval treated the overt act here charged as itself conclusive evidence of the intent:

First, Hodges is accused of adhering to the enemy, and the overt act laid consists in the delivery of certain prisoners, and I am of opinion that the overt act laid in the indictment and proved by the witness is high treason against the United States.

Second: When the act itself amounts to treason it involves the intention, and such was the character of this act. No threat of destruction of property will excuse or justify such an act; nothing but a threat of life, and that likely to be put into execution.

Houston, D. J., said that he did not "entirely agree" with the chief justice on these points, but did not specify further his disagreement. The jury acquitted. Duval's charge seems to state an unnecessarily mechanical rule, turning on the showing of an act which "itself amounts to treason"; the facts seem to present the more familiar situation of mixed motives, and the jury might have been charged in conventional terms that defendant cannot escape the plain consequences of his conduct by pleading a personal motive therefor. Cf. note 98, *infra*. The jury's acquittal probably



With respect to the intention, likewise, there is not, unhappily, the slightest possibility of doubt. To suppress the office of excise, in the Fourth survey of this state, and particularly, in the present instance, to compel the resignation of Wells, the excise officer, so

represents a de facto rule recognizing an excuse which legal doctrine would find it dangerous to crystallize.

In *U. S. v. Haupt*; 136 F. (2d) 661, 665 (C. C. A. 7th, 1943), rev'g 47 Fed. Supp. 836 (N. D. Ill. 1942), the court rejected defendants' argument that the indictment had improperly joined different offenses, since different overt acts of aid and comfort were alleged, in which not every defendant was charged to have participated. The court said that

The constitutional requirement "of two Witnesses to the same overt Act" forms no part of the definition of the offense. It relates solely to the proof required before a conviction can be had. The crime itself may be established in the same manner as any other crime, but before there can be a conviction, an act in its promotion must be established by two witnesses. In other words, the two-witness provision of the Constitution is an evidential requirement prerequisite to conviction. Moreover, the constitutional requirement "of two Witnesses to the same overt Act" appears to be an implied recognition that there may be more than one act committed in the execution of the offense. Otherwise, use of the word "same" would seem to be superfluous.

The court cites nothing but the words of the constitutional provision for its argument; and on this basis alone, its contention seems extreme, in view of the plain implication of overt acts in the "levying" of war and the "giving aid and comfort". Further, as has been noted, the history of the successive drafts of the treason clause in the Convention reflects an understanding that the crime included a distinct act element. See note 28, *supra*. On the merits, the court's ruling is open to question; and that the court had some question of it itself is indicated by its caution

as to render null and void, in effect, an act of congress, constituted the apparent—the avowed—object of the insurrection \* \* \* Combining these facts, and this design, the crime of high treason is consummate \* \* \*

What is meant, concretely, when the opinions say that the intent and the act are “separate” ele-

that if its ruling on the indictment leaves the door open to unfairness, this may be dealt with at the trial stage by allowance of motions for separate trials. In fact, the court reversed in this case because it felt that the trial court had abused its discretion by denying such severance after the evidence for the prosecution was in and showed considerable variations in the charges proven in connection with various defendants. In the context of the history of the case as a whole, the court's ruling thus takes on the character of an awkward rationalization employed to dispose of a point of pleading.

The opinion of Learned Hand, D. J., in *U. S. v. Robinson*, 259 Fed. 685 (S. D. N. Y. 1919) does not deny, but rather firmly asserts, according to its own theory, the separate character of the intent and act elements, insisting that the requisite act should be more than such as merely makes out an attempt. Thus at 259 Fed. 685, 690, he argues that in the charge of adhering to enemies,

Strictly, no overt act should have been held sufficient which merely manifested a traitorous intent, because the treason lay in hostile acts, for the words “adhering” must be taken as defined by the phrase “giving aid and comfort.” It was hardly the purpose of the 25th of Ed. III to allow the treason of levying war or of adhering to the enemy to be proved merely as attempt; nor is there a sound reason for supposing that the overt act was meant only to disclose a traitorous intent in treasons which involved more than intent.

<sup>30</sup> Fed. Cas. No. 16,621, 28 Fed. Cas. 376 (Circ. Ct. D. Pa. 1795).

ments of the crime? As Mr. Justice Paterson's charge implies, this must mean, as a minimum, that the prosecutor has the burden of producing adequate evidence to establish two propositions—one concerning a state of mind, and one concerning, at least in the first instance, something else called an "overt act". It is conceivable that the same evidence might establish both propositions, though in none of the American prosecutions does it appear that the government relied on such single, double-duty proof.<sup>31</sup> Indeed, since the law, even in treason, recognizes the defense of duress under immediate threat to life, it seems possible always to cast doubt on the sufficiency of the most conclusive appearing evidence of treasonable conduct.<sup>32</sup> But, in any event the decisions make it clear that, however clear the evidence of the one element, if the evidence does not establish beyond a reasonable doubt the existence of the other, the prosecution fails. Thus, though it be assumed that there is incontrovertible evidence of treasonable

<sup>31</sup> The case against Jefferson Davis may have been shaping up this way. See Fed. Cas. No. 3621a, 7 Fed. Cas. 63 (Circ. Ct. D. Va. 1867-1871).

<sup>32</sup> See *Respublica v. McCarty*, 2 Dall. 86, 1 L. Ed. 300 (Pa. Oyer and Terminer, 1781); *U. S. v. Hodges*, Fed. Cas. No. 15,374, 26 Fed. Cas. 332 (Circ. Ct. D. Md. 1815). There may be room for argument whether the prosecution's burden of proof does not include the issue of duress, at least if the defendant has gone forward with some evidence on the point, but even without this factor, the fact that the defense is recognized at all may cast doubt on the "intrinsic" character of the most treasonable appearing conduct. Cf. 9 Wigmore on Evidence (3d ed. Boston, 1940) sec. 2512, especially note. 4.

plotting to subvert the government, a conspiracy to levy war is not treason within the constitutional definition, says Mr. Chief Justice Marshall, because plotting does not amount to a sufficient overt act within the meaning of that branch of the crime:

To constitute that specific crime for which the prisoners now before the court have been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offenses. The first must be brought into open action, by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed.<sup>33</sup>

On the other hand, where there was a clear overt act of armed resistance to constituted authority—

<sup>33</sup> *Ex parte Bollman*, 4 Cranch 75, 124, 12 L. Ed. 554, 571 (U. S. 1807). See charge to jury by Peters, D. J., in first trial of Fries, Fed. Cas. No. 5126, 9 Fed. Cas. 826, 909 (Circ. Ct. D. Pa. 1799), and charge of Chase, Circ. J., on second trial, Fed. Cas. No. 5127, id., 924, 931 Livingston, Circ. J., in charge to jury in *U. S. v. Hoxie*, Fed. Cas. No. 15,407, 26 Fed. Cas. 397, 398; charge to Grand Jury, by Story, Circ. J., Fed. Cas. No. 18,275, 30 Fed. Cas. 1046, 1047; charge to Grand Jury, by Sprague, D. J., Fed. Cas. No. 18,263, 30 Fed. Cas. 1015 (D. Mass. 1851); charge to jury by Grier, Circ. J., in *U. S. v. Hanway*, Fed. Cas. No. 15,299, 26 Fed. Cas. 105, 127 (Circ. Ct. E. D. Pa. 1851); charge to Grand Jury, by Nelson, Circ. J., Fed. Cas. No. 18,271, 30 Fed. Cas. 1034, 1035 (Circ. Ct. S. D. N. Y. 1861) charge to Grand Jury, by Leavitt, D. J., Fed. Cas. No. 18,272, 30 Fed. Cas. 1036, 1037 (S. D. Ohio, 1861); cf. *Wimmer v. U. S.*, 264 Fed. 11, 13 (C. C. A. 6th, 1920), cert. den., 253 U. S. 494.

as by an armed clash with government troops seeking to enforce an embargo, or a forcible resistance to the execution of the Fugitive Slave Law—verdicts were nevertheless directed, because the Circuit Justices presiding found that evidence of treasonable intention was lacking, or that at least the evidence was ambiguous whether force was not applied for particular or private purposes and hence would not sustain the prosecution's burden of proof.<sup>34</sup> The distinct character of the intent and act elements of the crime is further reflected in rulings that, since each must equally be established, it is in the discretion of the prosecutor which he seeks to prove first.<sup>35</sup> If one of the two elements were merely corroborative of the other, it would plainly be improper and capable of prejudicial effect on the defendant's rights, to permit the prosecutor to prove the corroborative fact before establishing the fact corroborated. So Mr. Chief Justice Marshall analyzed the problem when, as presiding Justice in

<sup>34</sup> *U. S. v. Horie*, Fed. Cas. No. 15,407, 26 Fed. Cas. 397 (Circ. Ct. D. Vt. 1808); *U. S. v. Hawkey*, Fed. Cas. No. 15,299, 26 Fed. Cas. 105 (Circ. Ct. E. D. Pa. 1851); cf. *U. S. v. Leiner*, Cr. No. 113-120, S. D. N. Y., 1943 (unreported), reprinted in Petitioner's Brief, *U. S. v. Cramer*, U. S. Sup. Ct. October Term, 1943, p. 47.

<sup>35</sup> *U. S. v. Burr*, Fed. Cas. No. 14,692h, 25 Fed. Cas. 52, 54 (Circ. Ct. D. Va. 1807); *U. S. v. Lee*, Fed. Cas. No. 15,581, 26 Fed. Cas. 907 (Circ. Ct. D. C. 1814); The Trial of Thomas Wilson Dorr, 2 American State Trials (Lawson ed. St. Louis 1914) 5, 22 (R. I. Sup. Ct. 1844), Pitman, Report of the Trial of Thomas Wilson Dorr (Boston, 1844) 22, 25, Turner and Bulges, Report of the Trial of Thomas Wilson Dorr (Providence, 1844) 10; cf. *U. S. v. Fricke*, 259 Fed. 673, 675 (S. D. N. Y. 1919). —

the Burr trial, he permitted the prosecution to proceed with evidence of intent before the act charged in the indictment had been established:

It has been truly stated that the crime alleged in the indictment consists of the fact, and of the intention with which that fact was committed. The testimony disclosing both the fact and the intention must be relevant. The court finds no express rule stating the order in which the attorney is to adduce relevant testimony, nor any case in which a court has interfered with the arrangement he has made. No alteration of that arrangement, therefore, will now be directed. But it is proper to add that the intention which is considered as relevant in this stage of the inquiry is the intention which composes a part of the crime, the intention with which the overt act itself was committed—not a general evil disposition, or an intention to commit a distinct fact. This species of testimony, if admissible at all, is received as corroborative or confirmatory testimony. It does not itself prove the intention with which the act was performed, but it renders other testimony probable which goes to that intention. It is explanatory of, or assistant to, that other testimony. Now it is essentially repugnant to the usages of courts, and to the declarations of the books by whose authority such testimony is received, that corroborative or confirmatory testimony should precede that which it is to corroborate or confirm. Until the introductory testimony be given, that which is merely corroborative is not relevant, and of consequence, if objected to, cannot be admitted without violating the best settled rules of evidence.



This position may be illustrated by a direct application to the testimony of General Eaton. So far as his testimony relates to the fact charged in the indictment, so far as it relates to levying war on Blennerhassett's island, so far as it relates to a design to seize on New Orleans, or to separate by force the Western from the Atlantic states, it is deemed relevant and is now admissible. So far as it respects other plans to be executed in the city of Washington, or elsewhere, if it indicate a treasonable design, it is a design to commit a distinct act of treason, and is therefore not relevant to the present indictment. It can only, by showing a general evil intention, render it more probable that the intention in the particular case was evil. It is merely additional or corroborative testimony, and, therefore, if admissible at any time, is only admissible according to rules and principles which the court must respect, after hearing that which it is to confirm.<sup>36</sup>

The fact that the intent and the act elements are thus distinct, so that the prosecution must equally establish each to make out its case, in itself carries some suggestion that these propositions are required to be established for different reasons of policy. If these two elements perform different functions, it follows that the evidence sufficient to establish one may not necessarily be required to be of a character relevant to establishing the other. As an *a priori* matter, it may of course also be argued that both elements are designed,

<sup>36</sup>*Loc. cit. supra*, note 35, p. 54. See 7 Wigmore on Evidence (3d ed. Boston, 1940) sec. 2038, praising the "lucid opinion by Marshall, C. J."

ultimately, to prove the intent, which is the basic factor which may make the accused a dangerous man; and that it would not be irrational, in promotion of the obvious concern of the framers to safeguard the rights of the accused, if the "overt act" was intended to be such as would offer corroborative evidence of the intent. It may fairly be urged that men in all ages would be perfectly willing to punish one whom they were sure was adhering to the state's enemies by treacherous thoughts; that the practical problem is, one of securing adequate proof to assure against abusive prosecutions of the innocent; and that, hence, if the overt act element is construed to require proof which will provide cumulative evidence of intent, this is not to say that the overt act requirement is rendered meaningless.<sup>37</sup> Whatever the persuasiveness of this latter analysis, certainly it must carry the burden of proof, for by familiar principles of construction, distinct elements in a constitutional, legislative or judge-made rule of law are to be taken *prima facie* as intended to serve distinct purposes.<sup>38</sup> Further, if the evidence to establish the overt act is required to be such as will corroborate the existence of the intent, it is

<sup>37</sup> Obviously, this suggested analysis has some analogy to the argument of Judge Learned Hand, in *U. S. v. Robinson*, 259 Fed. 685 (S. C.D. N. Y. 1919). But, as was pointed out in note 29, *supra*, Judge Hand's position does not really mingle the intent and act elements, but insists on a more rigorous demonstration of a completed act of "levying" or "adhering" and an avoidance of rulings which would make treason a type of attempt.

<sup>38</sup> See Marshall, C. J., in *Marbury v. Madison*, 1 Cranch 137, 174, 2 L. Ed. 60, 72 (U. S. 1804).

difficult to understand the decisions which so rigorously insist on full proof of each element, acquitting defendants whose intent is assumed treasonable but who have not been shown guilty of an "overt act." Likewise it is hard to see how it can be said to be immaterial which element of the crime is proved first, if one is corroborative of the other.<sup>39</sup> The proponents of the latter analysis may fairly point out that in the cases so ruling on the order of proof the issues arose because the prosecution sought first to introduce its evidence on intent, and that it is hence wholly consistent with a corroborative function of the act element to introduce the principal evidence on intent first. But the rulings make no such distinction, and Mr. Chief Justice Marshall plainly says that there is nothing inherent in either element to give it priority in order of proof. Indeed, his observation takes on greater force when one recalls that it was made in answer to the contention that the act must be proved first.

More direct evidence of the nature of the overt act, and hence of the kind of proof necessary to make it out, may be found in what the courts have to say about the function of this element of the crime. What is the purpose or policy in requiring a showing of an "overt act"? Some indication is conveyed when, in *United States v. Mitchell*, Mr. Justice Paterson approvingly cites Foster to the effect that, as an overt act of levying of war, "the very act of marching is considered as carrying the traitorous intention into

<sup>39</sup> See notes 33-36, *supra*.

effect . . . .<sup>40</sup> Charging the Grand Jury which was investigating the property tax disturbances of 1799, Mr. Justice Iredell observed that

if . . . . the intention was to prevent by force of arms the execution of any act of the congress of the United States altogether (as for instance the land tax act, the object of their opposition), any forcible opposition calculated to carry that intention into effect, was a levying of war against the United States, and of course an act of treason.<sup>41</sup>

And in the first trial of Fries, resulting from this investigation, Judge Peters told the jury: concerning the alleged forcible rescue of prisoners in custody of the United States marshal, that

Indeed, the treason would be complete, by the conspiracy, in any part of the district, to commit the treasonable act at Bethlehem, if any had, in consequence of the conspiracy, marched or committed any overt act for the purpose, though the actual rescue had not taken place. So we thought in the Cases of the Western Insurgents [*See U. S. v. Vigol*, Fed. Cas. No. 16,621, 28 Fed. Cas. 376; *U. S. v. Mitchell*, Fed. Cas. No. 15,788, 26 *id.* 1277], that the treason, concocted at Couche's Fort, would have been complete, if any had only marched to commit the crime; though the design had not arrived

<sup>40</sup> Fed. Cas. No. 15,788, 26 Fed. Cas. 1277, 1280 (Circ. Ct. D. Pa. 1795).

<sup>41</sup> Case of Fries, Fed. Cas. No. 5126, 9 Fed. Cas. 826, 840 (Circ. Ct. D. Pa. 1799); see also Chase, Circ. J., in charge to jury on second trial of Fries, Fed. Cas. No. 5127, *id.* 924, 931 (Circ. Ct. D. Pa. 1800).

to the disgraceful catastrophe it finally attained.<sup>42</sup>

In the second trial of Fries, Mr. Justice Chase charged that

\* \* \* if a body of people conspire and meditate an insurrection to resist or oppose the execution of any statute of the United States by force, \* \* \* they are only guilty of a high misdemeanour; but if they proceed to carry such intention into execution by force, \* \* \* they are guilty of the treason of levying war, and the quantum of the force employed neither lessens nor increases the crime \* \* \* a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used, in pursuance of such design to levy war; but \* \* \* it is altogether immaterial whether the force used is sufficient to effectuate the object—any force connected with the intention will constitute the crime of levying war.<sup>43</sup>

To the same effect, of course, is Marshall's famous ruling on conspiracy to levy war in *Ex parte Bollman*, which has already been quoted.<sup>44</sup> The underlying thought emerges still more sharply in

<sup>42</sup> Fed. Cas. No. 5126, 9 Fed. Cas. 826, 909; cf. *Aredell*, Circ. J., 914.

<sup>43</sup> Fed. Cas. No. 5127, 9 Fed. Cas. 924, 931.

<sup>44</sup> See note 33, *supra*; *U. S. v. Burr*, Fed. Cas. No. 14,692a, 25 Fed. Cas. 2, 13-14 (Circ. Ct. D. Va. 1807), and Fed. Cas. No. 14,693, *id.*, 55, 168. All of the rulings and dicta refusing to recognize a conspiracy as a sufficient overt act of levying war, cited in note 33, contain similar language or implications.

*United States v. Pryor*, where Mr. Justice Washington told the jury that the mere setting out in search of provisions to be turned over ultimately to the enemy did not seem to him a sufficient overt act of adherence:

\* \* \* the law does not constitute such an act treason, even although these motives [of ransoming himself and fellow prisoners] had not existed; and, although intentions and feelings as disloyal as ever stained the character of the most atrocious traitor, were proved against the prisoner. Can it be seriously urged, that if a man, contemplating an adherence to the enemy, by supplying them with provisions, should walk towards the market-house to purchase, or into his own fields to slaughter whatever he might find there, but should, in fact, do neither one or the other of the intended acts, he has committed an overt act of adhering to the enemy? Certainly not. — All rests in intention merely, which our law of treason in no instance professes to punish. Carrying provisions toward the enemy, with intent to supply them, though this intention should be defeated on the way, would be very different from the act of going in search of provisions for such a purpose, and stopping short before any thing was effected, and whilst all rested in intention. \* \* \*

Charging the Grand Jury in Rhode Island, with the memories of Dorr's Rebellion fresh in mind, Mr. Justice Story again stated the now familiar relation between act and intention:

<sup>45</sup> Fed. Cas. No. 16,096, 27 Fed. Cas. 628, 630 (Circ. Ct. D. Pa. 1814).



To constitute an actual levy of war, there must be an assembly of persons, met for the treasonable purpose, and some overt act done, or some attempt made by them with force to execute, or towards executing, that purpose. \* \* \* If the assembly is arrayed in a military manner,—if they are armed and march in a military form, for the express purpose of overawing or intimidating the public,—and thus they attempt to carry into effect the treasonable design,—that will, of itself, amount to a levy of war, although no actual blow has been struck, or engagement has taken place. This is a clear case \* \* \*

To the same effect are the numerous charges to grand and petit juries occasioned by disturbances against the Fugitive Slave Law and the outbreak of the Civil War.<sup>40</sup> In *United States vs Fricke*, in 1919, Judge Mayer continued the theme, in telling the jury that

An overt act in itself may be a perfectly innocent act standing by itself; it must be

<sup>40</sup> Fed. Cas. No. 18,275, 30 Fed. Cas. 1046, 1047 (Circ. Ct. D. R. I. 1842).

<sup>41</sup> Charge to Grand Jury, Fed. Cas. No. 18,263, 30 Fed. Cas. 1015 (D. Mass. 1851); same, Fed. Cas. No. 18,276, *id.*, 1047 (Circ. Ct. E. D. Pa. 1851); *U. S. v. Hawkey*, Fed. Cas. No. 15,299, 26 Fed. Cas. 105 (Circ. Ct. E. D. Pa. 1851); Charge to Grand Jury, Fed. Cas. No. 18,269, 30 Fed. Cas. 1024 (D. Mass. 1851); *U. S. v. Greiner*, Fed. Cas. No. 15,262, 26 Fed. Cas. 36 (E. D. Pa. 1861); *U. S. v. Greathouse*, Fed. Cas. No. 15,254, 26 Fed. Cas. 18 (Circ. Ct., N. D. Cal. 1863); Charge to Grand Jury, Fed. Cas. No. 18,271, 30 Fed. Cas. 1034 (Circ. Ct. S. D. N. Y. 1861); same, Fed. Cas. No. 18,272, 30 Fed. Cas. 1036 (Circ. Ct. S. D. Ohio, 1861); *cf.* 10 Op. Atty. Gen. 513 (1863).

in some manner in furtherance of the crime  
 \* \* \* a person cannot be convicted of treason merely for having the intention in his own mind to adhere to and give aid and comfort to the enemy. This intention must be manifested by what is termed an overt act.<sup>45</sup>

In *United States v. Robinson*, Judge Learned Hand insists that if the law had continued its development along proper lines, the act in adherence should have to amount to a giving of aid and comfort, and not merely an attempt; and otherwise his conception of the proper distinction of act and intent follows the familiar pattern in pointing out that it is of the nature of the "overt act" that it constitutes a translation of intent into execution:

Strictly no overt act should have been held sufficient which merely manifested a traitorous intent, because the treason lay in hostile acts, for the words "adhering" must be taken as defined by the phrase "giving aid and comfort". It was hardly the purpose of the 25th of Ed. III to allow the treason of levying war or of adhering to the enemy to be proved merely as attempt; nor is there a sound reason for supposing that the overt act was meant only to disclose a traitorous intent in treason which involved more than intent. Probably the analogy with compassing confused the subject, but, whatever the cause, it was decided before the end of the seventeenth century (*Lord Preston's Case*, 12 How. St. Tr. 646) that aid and comfort need not reach the enemy, and that, though the accused were frustrated in his attempt,

<sup>45</sup> 259 Fed. 673, 677 (S. D. N. Y. 1919).

it was enough if the overt act declared his intent. This has since remained the law. \* \* \*

In the light of what he deemed the proper doctrine, Judge Hand's further ruling, raising the question whether the act laid may be "a step taken in execution of the traitorous design, innocent in itself, and getting its treasonable character only from some covert and undeclared intent", seems a deliberate deviation from the accepted analysis in order to limit the effect of what he deemed to be itself a departure from sound principle. Certainly, the familiar analysis is once more in the background of those contemporary decisions refusing to concede that "mere words", however treasonable the intent evidenced therein, could constitute treason within the constitutional definition, because they do not amount to sufficient execution of the thought.<sup>50</sup> Bringing the story up to date,

<sup>49</sup> 259 Fed. 685, 690 (S. D. N. Y. 1919).

<sup>50</sup> *Frohwerk v. U. S.*, 249 U. S. 204, 210 (1919); *Wimmer v. U. S.*, 264 Fed. 11, 13 (C. C. A. 6th, 1920), cert. den. 253 U. S. 494; *Equi v. U. S.*, 261 Fed. 53 (C. C. A. 9th, 1919), cert. den. 251 U. S. 560, 64 L. Ed. 414, 40 Sup. Ct. 219; *Lockhart v. U. S.*, 264 Fed. 14, 17 (C. C. A. 6th, 1920), cert. den. 254 U. S. 645, 65 L. Ed. 455, 41 Sup. Ct. 14; *Schubert v. U. S.*, 264 Fed. 1, 7 (C. C. A. 6th, 1920); *State v. McDonald*, 4 Port. 449 (Ala. 1837); *People v. Steelik*, 187 Cal. 361, 203 Pac. 78 (1919); *Taylor v. State*, 194 Miss. 1, 11 So. (2d) 663, rev'd on other grounds, 319 U. S. 583, 87 L. Ed. 1600, 63 Sup. Ct. 1200 (1943); *Berg v. State*, 29 Okla. Cr. Rep. 112, 233 Pac. 497 (Okla. Cr. Ct. App. 1925), with which compare separate opinion of Doyle, J., in *Ex parte Wood*, 110 P. (2d) 304, 309 (Okla. Cr. Ct. App. 1941); *State v. Laundry*, 103 Ore. 443-460, 204 Pac. 958, 964 (1922); *State v. Hennessy*,

one may note that in *United States v. Haupt*, the jury was instructed that

Any intentional act or acts furthering the hostile designs of the enemies of the United States gives aid and comfort and constitutes

114 Wash. 351, 195 Pac. 211 (1921); cf. *People v. Lloyd*, 304 Ill. 23, 136 N. E. 505 (1922).

The only adequate analysis supporting the proposition of these cases, that the espionage acts do not violate the limitation of the treason clause by creation of what is in effect a new branch of treason, is in *Wimmer v. U. S.*, 264 Fed. at 12. The court's argument not only treats the act and intent elements as distinct requisites of the prosecution's case, but also indicates that the court saw the function of the act element to be, not that of corroborating the existence of the intent, but of showing that there was also a will-to-act, a putting of the thought into execution:

Here the only conduct alleged or proved, as making out the offense, consisted of oral statements—words only. It is well settled that one cannot, by mere words, be guilty of treason \* \* \* and thus the fallacy of Wimmer's contention becomes apparent. It is a mistake to say that the intent is the thing which makes the treason, and that where the disloyal intent is there treason is. The requirement that there shall be two witnesses is purely evidential, but when the requirement is extended to proof of the overt act, it becomes clear that there must be an overt act to constitute the crime, and the act is incorporated into the definition. Thus, we find, in the constitutionally defined crime, two elements, the intent and the act; neither is dominant. Intent minus act is not treason, any more than act minus intent is. Since it was declared, by Chief Justice Marshall in the Bollman Case, 4 Cranch 75, 2 L. Ed. 554, it has never been doubted that Congress may punish, under the ordinary rules of prosecution, and without trenching upon the constitutional limitation as to treason, acts which are of a seditious

adhering to such enemies. \* \* \* An overt act, in criminal law, is an outward act done in pursuance and in manifestation of an intent or design; an overt act in this case means some physical action done for the purpose of carrying out or of affecting the treason. [sic].<sup>51</sup>

and in *United States v. Stephan*, the charge likewise clearly declared that "The overt act is the doing of some actual act, looking towards the accomplishment of the crime."<sup>52</sup>

nature and tend toward treason, but which are not of the direct character and superdangerous degree which would meet the constitutional test and make them treason; and even more must this be true of words.

Further distinction is found in the very words of the constitutional definition. Treason is "adhering to their enemies, giving them aid and comfort." Both adherence and giving aid are necessary. To "favor or support" is, very likely, to "adhere"; but it does not carry the idea of giving aid and comfort, unless by a rather remote complication. Hence it may well be said that adherence by words only is an offense quite distinct from treason.

Whether or not the court's position is regarded as sound on the merits of the constitutional question [see Anderson, J., dissenting in *Taylor v. State*, 194 Miss. 54-57, 41 So. (2d) 663, 681-682 (1943)], it is clear what is its understanding of the relation of the act and intent elements, and its position therein is consistent with the almost unanimous authority of the American cases.

<sup>51</sup> 47 Fed. Supp. 836, 839 (N. D. Ill. 1942). No criticism was expressed of this part of the charge, on reversal, 136 F. (2d) 661 (C. C. A. 7th, 1943).

<sup>52</sup> 50 Fed. Supp. 738, 742-743, note. This charge was approved in its entirety on appeal, 133 F. (2d) 87, 99 (C. C. A. 6th, 1943). And compare, of course, *Cramer v. U. S.*, 137 F. (2d) 888, 894.

It thus appears that, with remarkable unanimity—the more impressive because the characteristic succinctness of the statements reflects an absence of any questioning of the point—the judges have stated the function of the overt act element of the crime as consisting in the demonstration that the defendant has moved from the realm of thought, plan, ideas or opinions, into the world of action. The overt act is to show that defendant has done something about what he has in his mind. In more positive terms of the underlying policy, the function of the overt act element is to prevent the punishing of men as traitors for their thoughts alone. This is expressed in the passage already quoted from *United States v. Pryor*.<sup>52</sup> In a charge to the Grand Jury, in 1861, Judge Leavitt declared that the required overt act must be “of a character susceptible of clear proof, and not resting in mere inference or conjecture”, and explained that the purpose of the requirement was

to exclude the possibility of a conviction \* \* \* upon proof of facts which were only treasonable by construction or inference, or which have no better foundation than mere suspicion. \* \* \* Hence, it will be obvious that however strong may be the grounds of suspicion or belief, that an individual is disloyal to his country or his government, until his disloyalty is developed by some open and provable act, he is not legally guilty of the crime of treason. And it follows, also, that mere expressions of opinion indicative of sympathy with the

<sup>52</sup> See note 45, *supra*; cf. *U. S. v. Burr*, Fed. Cas. No. 14,692a, 25 Fed. Cas. 2, 13-14 (Circ. Ct. D. Va. 1807).



public enemy, will not ordinarily involve the legal guilt of that crime. \* \* \*<sup>54</sup>

As Judge Leavitt's charge suggests, the overt act requirement in "treason" may, because of the political character of the crime, involve elements of policy additional to those considerations which in the criminal law generally require an act as well as intent to establish guilt. The charge to the jury by Judge Mayer in *United States v. Fricke* makes this more explicit, and links the function of the overt act to the policies favoring free speech and thought and the protection of the individual against public prejudice which we have previously noted as bases for the general restrictive policy represented by the constitutional definition of treason. Judge Mayer's comments are important enough to justify quoting them in full, at the expense of some repetition:

Naturally passion is high; patriotic men and women are concerned with the safety of their country; and in the excitement it is but human nature sometimes to lose sight of the calm requirements of the law, and convict, as the expression goes, on general principles; and so, to safeguard against anything of that kind, and in order to prevent the conviction of any man for what he had in his mind, as distinguished from what he did, the constitutional provision as to an overt act was inserted; \* \* \* An overt act in itself may be a perfectly innocent act standing by itself; it must be in some manner in furtherance of the crime. \* \* \* a person cannot be convicted of treason

<sup>54</sup> Fed. Cas. No. 18,272, 30 Fed. Cas. 1036, 1037 (Circ. Ct. S. D. Ohio, 1861).

merely for having the intention in his own mind to adhere to and give aid and comfort to the enemy. This intention must be manifested by what is termed an overt act.<sup>55</sup>

The function of the overt act, to demonstrate that intent has been put into execution, is plainly stated in the charge to the jury approved by the Sixth Circuit Court of Appeals in *United States v. Stephan*, though here the basis of the doctrine is identified with the general policy of the criminal law:

An overt act means something more than what is in the mind. We get the problem of an overt act in connection with a number of different crimes. For instance, it isn't right for two men to get their heads together to rob this post office to-night, but, so far as the federal law is concerned, not a single thing could be done about it because there has been no overt act; but just as soon as one or more of them did a single thing looking towards the accomplishing of that, like going and getting a revolver, a flash light, a jimmy, or some dynamite, an overt act has been done, and the conspiracy can be punished. I mention that so that you will know what I mean by an overt act. The overt act is the doing of some actual act, looking towards the accomplishment of the crime.<sup>56</sup>

Judge Learned Hand's holding, in *United States v. Robinson*, appears to be the only considered

<sup>55</sup> 259 Fed. 673, 677 (S. D. N. Y. 1919).

<sup>56</sup> 50 Fed. Supp. 738, 742-743, note (E. D. Mich. 1943), approved, 133 F. (2d) 87, 99 (C. C. A. 6th, 1943).

statement advancing a different explanation of the function of the overt act element.<sup>57</sup> As has been

<sup>57</sup> Judge Hand directed a verdict in *U. S. v. Robinson*, 259 Fed. 685, 694 (S. D. N. Y. 1919), ruling that

\* \* \* it is necessary to produce two direct witnesses to the whole overt act. It may be possible to piece bits together of the overt act, but, if so, each bit must have the support of two oaths; on that I say nothing. In the case of none of the overt acts at bar was the necessary evidence produced. The gravamen of the charge depended for direct support on Victorica alone. For the rest, the case rested upon circumstantial evidence, which, while well-nigh conclusive in fact, was not direct as required \* \* \*

At page 690 he states that the third overt act of the first count "is good as a pleading under any rule", including his suggested doctrine, that the overt act must "openly manifest" treason. In his description, (p. 686):

The third overt act [of the first count] was that on June 6, 1917, defendant embarked from the city of Rotterdam bound for New York, carrying with him the reply messages heretofore described, with intent to convey these to the agents of the German government, Victorica, Wessels, Ryan, and O'Leary, and with intent to act as a secret agent for the German government.

As to the proof of this act, he notes (p. 688),

His return on June 6, 1917, was proved by two passengers, who were in the second cabin along with him, and his presence in New York, registered under surreptitious names, was proved by a number of witnesses. Nothing was shown of what he had done in Rotterdam or anywhere else in Europe except that he had been met upon the street by one of the witnesses in clothes noticeably better than that which he possessed while on board.

Victorica—and possibly O'Leary—testified to delivery of the messages at a meeting subsequent to defendant's return

noted, his theory as to what the law once was and should still be, does not assign to the overt act element the role merely of corroborating evidence of intention, but rather emphasizes its character as "act" by insisting that an accomplished levying of war or giving of aid and comfort should be shown.

The words "overt act" go back to the original statute of the 25th Ed. III. Under chapter 3 of 21 Rich. II no overt act was necessary for two years, until it was again reintroduced by chapter 10 of the 1st of Hen. IV, the preamble to which indicates the reason for its restoration: "There was no man which did know how he ought to behave himself to do speak or say for doubt of such pains" (of treason). It is clear that men feared prosecutions pieced together inferentially from chance words or deeds which need not be charged and against which no preparation could be made. Even in the times of Hen. VIII, when the law of treason was extended to its extremest limit, the provision was retained of some overt act, or at least some written or spoken words which evinced the traitor-

(p. 688). Since there were two witnesses to defendant's return on the steamer, but these witnesses could not testify that defendant bore messages, it seems clear that it is Judge Hand's concept that the act must be such as evidences intent, which leads him to rule that there were not "two direct witnesses to the whole overt act", but only to part of it. The opinion in *Cramer v. U. S.*, 137 F. (2d) 888, 895 (C. C. A. 2d, 1943) thus appears to be in error in declaring that Judge Hand's theory of the nature of the overt act is expressed only as a "dictum". See also notes 29 and 49, *supra*, regarding Judge Hand's analysis of the "proper" character of the overt act, as the accomplished offense.

ous design. That design was indeed the substance of the act of compassing, and, in spite of the long history of distortion which compassing endured, the logic of the relation between the overt act and the crime was kept sound. In short, the treason must be manifested by some open deed, whose happening necessarily involved the commission of the crime. This was probably what the original words meant.

In cases of adhering to the enemy the same consistency was not observed. Strictly no overt act should have been held sufficient which merely manifested a traitorous intent, because the treason lay in hostile acts, for the words "adhering" must be taken as defined by the phrase, "giving aid and comfort". It was hardly the purpose of the 25th of Ed. III to allow the treason of levying war or of adhering to the enemy to be proved merely as attempt; nor is there a sound reason for supposing that the overt act was meant only to disclose a traitorous intent in treasons which involved more than intent. Probably the analogy with compassing confused the subject, but, whatever the cause, it was decided before the end of the seventeenth century (Lord Preston's Case, 12 How. St. Tr. 646) that aid and comfort need not reach the enemy, and that, though the accused were frustrated in his attempt, it was enough if the overt act declared his intent. This has since remained the law \* \* \*

Nevertheless a question may indeed be raised whether the prosecution may lay as an overt act a step taken in execution of the traitorous design, innocent in itself, and getting its treasonable character only from some covert and undeclared intent. It is true that in prosecutions for conspiracy un-

der our federal statute, it is well settled that any step in performance of the conspiracy is enough, though it is innocent except for its relation to the agreement. I doubt very much whether that rule has any application to the case of treason, where the requirement affected the character of the pleading and proof, rather than accorded a season of repentance before the crime should be complete. Lord Reading in this charge in *Casement's Case* uses language which accords with my understanding: 'Overt acts are such acts as manifest a criminal intention and tend towards the accomplishment of the criminal object. They are acts by which the purpose is manifested and the means by which it is intended to be fulfilled.'

As will be noted, Judge Hand cites only the terms of the statutes for his claim that the overt act should show accomplished aid and comfort or levying of war.<sup>38</sup> That the *prima facie* meaning of the statutory words supports him is evidenced by the early legislation and judicial constructions which were felt necessary in turbulent times to strike preventively at conspiracies not covered by the Statute of Edward III.<sup>39</sup> But both in the breadth of its terms and the basic nature of the crime with which it deals, and the policy which it represents, the Statute has the character of a constitutional provision the scope of whose meaning unfolds with experience. And the history of the Statute shows that long before *Lord Preston's Case*, the overt act element in treason had been

<sup>38</sup> 259 Fed. 685, 689-690 (S. D. N. Y. 1919).

<sup>39</sup> 2 Stephen, H. C. L. 263; 4 Holdsworth 496-497; 8 *Id.* 910.



so treated as to make the crime itself of the nature of an attempt.<sup>60</sup> As Judge Hand concedes,

<sup>60</sup> Staundford has nothing pertinent to the attempt aspect of "treason", except like all his successors he in effect notes that compassing is itself a crime in the nature of an attempt ("Cest compassement, ou imagination, sauns reducer cec al effect, est grand treason \* \* \*"). Lib. 1, cap. 2 (H). This is not to say that early law would view treason as merely an attempt at some further result, however. Coke begins his treason chapter by noting early authority demonstrating the maxim "*voluntas reputatur pro facto*": i. e., early authority regarded the criminal intent in all serious crimes, at least when something was done towards its effectuation, as dangerous enough to be regarded as the substantive crime itself. Coke, 3d Inst., 5. Coke perhaps supports Judge Hand's theory, that in early history attempted treason was not treason, in his doctrine that a conspiracy to levy war is not the crime of levying war. Coke, 9. However, Pollock and Maitland and Holdsworth explain this not as arising from any aversion to treating treason as an attempt, but as arising from the tenacity of the feudal concept of mutuality in the bond of lord and vassal, entitling the aggrieved vassal to war on a lord who had broken the bond. 2 Pollock and Maitland 598; 8 Holdsworth 331. Quære, however, whether the crime does not, practically, take on the character of attempt when Coke approvingly states that it is not necessary that there be a great number of persons to levy war (p. 9). Coke's stress on the statute's declaration that the defendant be "*provablement* \* \* \* attaint" (p. 12) might be deemed to support Judge Hand's stress that the object of the overt act requirement is to bar patchwork constructions of evidence; Coke explains this means, "upon direct and manifest proof, not upon conjecturall presumptions, or inferences, or straines of wit, but upon good and sufficient proofe \* \* \*". He is not here directly interpreting the meaning of the overt act element; but in the next section, in which he does undertake to do so, he says it "doth also strengthen the former exposition of the word [*provablement*] that it must be probably, by an open act,

the English decisions following Lord Preston's Case make this perfectly clear; and there is nothing

which must be manifestly proved." (p. 12). Judge Hand's distinction of adhering and levying from compassing on the ground that in the first two "the treason lay in hostile acts" may be supported by *inpuendo* in Coke's statement (p. 14), that the act requirement "relateth to the severall and distinct treasons before expressed, (and especially to the compassing and imagination of the death of the King, &c. for that it is secret in the heart) \* \* \*

1 Hale 131, 150, in effect introduces into the exposition of the crime of levying war a definition which makes it much of the nature of an attempt, when he says that the mere assembly of men in force, and their marching in military arrays, make out a levying; or the mere assembly in present force alone. *Id.*, 138 (case of the Earl of Essex). And he states that it is not necessary that a blow be struck. *Id.*, 144, 152. His discussion of adherence is very brief, and the examples given are of completed aid and comfort, as by delivery of a castle to the enemy. *Id.*, 167-168.

1 Hawkins 86, 94, in effect makes Judge Hand's point, that the design is itself the complete crime in compassing, citing the case of the regicides. But Hawkins also recognizes that the mere keeping together of armed men against the king's command is a levying of war, *id.*, 90; and that there may be a levying, though there is no actual fighting. *Id.*, 91. He is brief to the point of not being helpful in his definition of adherence; but he cites with approval the ruling that merely cruising with intent to destroy the king's subjects is adherence when done with the king's enemies. *Id.*, 91.

Foster, 195, introduces the first real analysis of underlying policy, when he justifies the doctrine that in compassing the design is itself the completed offense, by pointing to the importance to the security of the community of the king's safety, which supports the wisdom of striking at an early stage at threats to this security. Foster contributes little additional in defining the degree of accomplished resistance to lawful authority that is necessary to

ing in the discussions surrounding the framing and ratification of the Constitution to suggest

constitute levying of war. Regarding adherence, he approves the decisions finding a completed offense though the aid and comfort was intercepted, "for the party in sending did all he could; the treason was complete *on his part, though it had not the effect he intended.*" *Id.*, 217. He simply cites cases, and makes no reference to his discussion of the policy behind the broad scope of compassing, though he does take pains to note that the defendants in the cited cases were also charged with compassing. He states that the rulings, considered as defining the crime of adherence, "may very well be supported", but in context this appears to mean only that they are supported by precedents. Lumping both levying and adhering together, he recognizes, without analyzing the underlying policy, that they may be made out without showing that the threat to the state has actually been brought to fruition: "An assembly armed and arrayed in a warlike manner for any treasonable purpose is *bellum levatum*, though not *bellum percussum*. Listing and marching are sufficient overt acts without coming to a battle or action. So cruising on the King's subjects under a *French* commission; France being then at war with us, was holden to be adhering to the King's enemies, though no other act of hostility was laid or proved." *Id.*, 218.

The upshot of this is scant. Judge Hand really has nothing more than the words of the Statute of Edward III on which to base his argument. Coke and Hale seem to have relied likewise on the contrast between the terms in which the three main branches of treason are there described, to explain why the conspiracy to levy war was not sufficient to make out a levying of war. But the scope of levying war seems, from Coke on, to make that offense analogous to an attempt, in the solicitude shown for taking preventive action against a threat to state security. Analysis of the crime of adherence is almost wholly lacking, and when it appears, amounts to no more than a citation of decisions which look in the same direction as developments under the head of levying war.

that in this respect the familiar terms of the English definition were intended to be taken in their unglossed rigor. The American decisions are in accord.<sup>61</sup>

Whether Judge Hand means to suggest that, in addition to amounting to the accomplished levying of war or giving of aid, the overt act must be evidence of the treasonable intent, is not altogether clear.<sup>62</sup> Plainly, the first does not neces-

<sup>61</sup> See *Ex parte Bollman*, 4 Cranch 75, 126, 2 L. Ed. 554, 571 (U. S. 1807); *U. S. v. Lee*, Fed. Cas. No. 15,584, 26 Fed. Cas. 907 (Circ. Ct. D. C. 1814); *U. S. v. Pryor*, Fed. Cas. No. 16,096, 27 Fed. Cas. 628, 631 (Circ. Ct. D. Pa. 1814); charge to Grand Jury, by Story, 9 Cr. J., Fed. Cas. No. 18,275, 30 Fed. Cas. 1046, 1047 (Circ. Ct. D. R. I. 1842); *U. S. v. Greenhouse*, Fed. Cas. No. 15,254, 26 Fed. Cas. 18, 24 (Circ. Ct. N. D. Cal. 1863); *U. S. v. Fricke*, 259 Fed. 673, 678, 679 (S. D. N. Y. 1910); cf. *U. S. v. Stephan*, 50 Fed. Supp. 445, 448 (E. D. Mich. 1943). That the law of treason is probably, in fact, the origin of the general law of attempt, see Hall, Criminal Attempt (1946) 49 Yale L. J. 789, 794-797, 815; cf. 2 Stephen, H. C. L. 227; 2 Pollock and Maitland 503, 509; 8 Holdsworth 309, 320. That treason is of the nature of a "direct attempt", see Strahorn, Effect of Impossibility of Criminal Attempts (1930) 78 U. Pa. L. Rev. 962, 964. This is also the executive construction of the scope of "treason" in the President's proclamation of April 16, 1945, warning of the nature and penalties of treasonable activities. 15 U. S. C. A. Annotation to Tit. 18, Ch. 1, Sec. 1, p. 1. *Contra*: *Respublica v. Maltby*, 1 Dall. 33 (Pa. 1778). See Strahorn, *op. cit. supra*, at 994-995.

<sup>62</sup> In the first of the paragraphs quoted at note 58, *supra*, he seems to emphasize primarily that the overt act should amount to the accomplished giving of aid and comfort or levying of war, rather than that it must evidence intent. This is consistent with his correct emphasis there that in compassing the expression of the design was not only evidence of intent but was itself the "act" constitut-

ing the crime. In the second quoted paragraph, his pre-occupation is still with his regret that something less than the accomplished act has come to be accepted; but here he does imply that the act should be evidence of intent as well as fulfilling the more important function of constituting the accomplished levying or giving of aid and comfort: it would not be "sound" to suppose that the act was meant "only" to disclose intent in crimes involving more than intent. It is only in the last quoted paragraph, after he has regretfully to concede that the precedents determine an attempt to be sufficient, that he apparently clings to the requirement that the act evidence intent; and by the time his analysis reaches this stage, his insistence seems more like an effort to repair damage done to a more fundamental doctrine, than conviction that he is expounding the truly basic, historically established principle which he believes in.

One aspect of the opinion in *Stephan v. U. S.*, 133 F. (2d) 87 (C. C. A. 6th, 1943) might, at first reading, seem to support the proposition that the act must evidence the intent; but, as in the *Robinson* case, more careful examination of the opinion raises a doubt whether this was the court's meaning, and shows that the real issue is one of the lack of sufficient evidence of intention apart from the act charged. Overt act No. 3 is described by the court as charging

That Stephan [defendant] on April 18, 1942, escorted Krug [the escaped prisoner] to the place of business of Theodore Donay in Detroit introducing Donay to Krug, who then related to Donay the incidents of his escape, his version of prison conditions in the prison camp in Ontario and of the intended future travel of Krug, at which place Stephan purchased candy for Krug and obtained money from Donay which was given to Krug for his use.

Id., 93. Krug was one witness to this act.

The confirmatory witness \* \* \* is one Rintelen, clerk in the business house of Donay. He knew appellant [defendant] and identified Krug from his

photographs. He testified that the two came in and appellant asked to see Donay, whereupon the three, standing close together "engaged in an important conversation which they held secretly." He saw appellant purchase the candy and saw Donay go to his cash drawer and when he next looked Donay was walking back to the others. The next day Rintelen found a slip for \$20.68 in the cash drawer, indicating that Donay had withdrawn that amount.

*Ibid.* The court declares that:

\* \* \* the proof of overt act (9) falls short. Rintelen overheard no consecutive part of the conversation that took place between Krug and Donay and we find nothing in his testimony from which a jury could be certain of what was said between them. The circumstances indicate with certainty that the Donay incident occurred but it cannot be established by vague testimony of one witness, plus circumstantial evidence. See United States v. Robinson, *supra*, 259 F. page 694.

*Id.*, 94. Note that apparently the only testimony regarding intent, in connection with this overt act No. 9, is that of Krug and Rintelen. The latter's testimony at the most might be deemed to convey circumstantial evidence (and that weak) of an intent on Donay's part to aid Krug with money; but it is of course no evidence to show that Donay knew who Krug was, and no evidence that defendant brought Krug there with the intent to obtain money for him from Donay, or to obtain it by telling Donay of Krug's actual purposes. Krug testified that he told his whole story to Donay, so that from this, one has evidence of Donay's intent in giving him money and in concealing Krug's identity; but Krug testified on cross examination that it was Donay and not defendant who gave him the money, and he did not testify to anything except the fact of his accompanying defendant to Donay's place of business, from which one might infer that defendant brought him there with the intent of obtaining further aid for him, unless from the circumstance that there is no evidence that



defendant objected when Krug disclosed his identity to Donay. Of course, from the other facts of defendant's aid to Krug, one might infer that when he took Krug to a person whom, according to Krug's testimony, defendant introduced as a "friend", it was with the intent of obtaining further aid. The intent, by the fact of the meeting, to give aid to Krug would distinguish this meeting from purely incidental meetings at which defendant introduced Krug, under an assumed name, just because the latter was with him when they met someone defendant knew; but the court treats one of this latter type of meeting as a sufficient overt act, by the concealment of Krug's identity (overt act No. 7). This was not that type of overt act, for there are not two witnesses to prove concealment of identity, and indeed one of the witnesses (Krug) testifies that identity was disclosed. In sum, as an overt act of procuring financial aid from Donay for Krug, No. 9 fails for satisfactory evidence of intention; and, on the other hand, it is plainly not relied on as an overt act by the concealment of Krug's identity.

It must be admitted, however, that the opinion indicates that the court did not clearly analyze the basis for its objection to the proof of overt act No. 9. The overt act is stated not merely as the introducing of Krug to Donay, but as the obtaining of money for Krug from Donay. As has been pointed out, conviction on this basis might well be disallowed because the evidence of intent is too weak. But the court phrases its objection in terms indicating that it feels it is the evidence of the overt act, rather than that of defendant's intent in connection therewith, which is insufficient: "We think that the proof of overt act (9) falls short." *Id.*, 94. But, since the crux of this act is not concealment, nor even the extending of "sympathy" or comfort by advice or persuasion, exhortation, etc., but is the procuring of money, it sounds as if the court is concerned for the absence of proof of intent, when it goes on to specify that

Rintelen overheard no consecutive part of the conversation that took place between Krug and Donay

sarily imply the second.<sup>63</sup> If he does mean that the act must evidence the intent, his history is again dubious. His interpretation of the significance of the repeal of 21 Rich. III, ch. 3, by 1 Hen. IV, ch. 10, is not an unreasonable one, on the face of the statutes alone. However, Lord Hale, who is the only one of the commentators to discuss the meaning of this repealer in any detail, criticizes it in ambiguous terms which may as reasonably be construed to object to the lack of evidence of a dangerous will-to-action, as to absence of evidence of an evil mind.<sup>64</sup> Moreover, Hale attributes the declaration of the preamble of 1 Hen. IV, ch. 10, to the uncertainties created by other broad provisions regarding treason besides that of the act of 21 Richard III.<sup>65</sup> The words of Hen. IV, ch. 10, are themselves open to the construction that,

and we find nothing in his testimony from which a jury could be certain of what was said between them.

*Ibid.* In its summary of Rintelen's testimony (*id.*, 93), the court takes pains to note that Rintelen does not testify to seeing the actual transfer of money from Donay to Krug; but it does not mention this gap in spelling out its reasons for finding the "proof of overt act (9)" insufficient.

<sup>63</sup> Compare Marshall's reservation, in *Ex parte Bollman*, of the possibility of convicting those who, when war has actually been levied by others, "perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy." \* \* \*

4 Cranch 75, 126, 2 L. Ed. 554, 571 (U. S. 1807). The decision subsequently, in *U. S. v. Burr*, Fed. Cas. No. 14,693, 25 Fed. Cas. 55 (Cir. Ct. D. Va. 1807) turns on a fatal variance between the proof and the overt act charged, and does not reject the dictum of the *Bollman* opinion.

<sup>64</sup> See 1 Hale 85, 111.

<sup>65</sup> *Id.*, 266, 267.

with the overt act element removed, men did not know *how far* they could go in the expression of ideas or in their conduct, before they would be deemed dangerous actors. In fact, this seems a more reasonable interpretation of the uncertainty allegedly created by the act of Richard III, for, otherwise, as Stephen drily observes of the preamble of 1 Hen. IV, ch. 10,

This language is obviously exaggerated. A man could hardly help knowing whether or not he intended, and whether or not his conduct indicated, an intention to kill or depose the king, but strict accuracy of statement is not to be expected of political opponents.

The passage which Judge Hand quotes from the charge in Casement's case supports the proposition that the act must evidence the intent little more than many other passages which could be quoted to the effect that the act must "manifest" the intention. As has been previously pointed out, such language is ambiguous, and may as well be intended to mean that an intention whose existence has been proved by other evidence must be shown to have been put into effect in some form of action.<sup>67</sup> It seems clearly to be so used, for example, by Judge Mayer in *United States v.*

<sup>67</sup> 2 H. C. L. 254.

<sup>68</sup> For similarly ambiguous language, see *Ex parte Bollman*, 4 Cranch 75, 134, 2 L. Ed. 554, 573 (U. S. 1807); *U. S. v. Burr*, Fed. Cas. No. 14, 692a, 25 Fed. Cas. 2, 14, and Fed. Cas. No. 14, 693 *id.*, 53, 167, 169; *U. S. v. Horie*, Fed. Cas. No. 15,407, 26 Fed. Cas. 397, 399-400 (Circ. Ct. D. Vt. 1808); Charge to Grand Jury, Fed. Cas. No. 18,272, 36 Fed. Cas. 1036, 1037 (Circ. Ct. S. D. Ohio, 1861).

*Frick*, where after stating that the overt act is required lest a man be convicted of treason "merely for having the intention in his own mind", and that "an overt act may in itself be a perfectly innocent act standing by itself", he sums up with the assertion that "This intention must be manifested by what is termed an overt act."<sup>68</sup>

An argument might be ~~drawn~~ from the two-witness requirement, that the overt act so to be proved must amount to more than any step taken in execution of an intention established by evidence extrinsic to the act: the requirement is clearly intended as a protection to the defendant against perjury and a manufactured case; if the act must be such as in itself is at least some evidence of a treasonable intent, the difficulties of producing two witnesses to such an act will make the requirement a real barrier to faked prosecutions; if any act in execution of an intent otherwise proved is sufficient, the difficulties of proof are so far reduced as to negative the value of the intended safeguard. This argument is not necessarily involved in Judge Hand's ruling in *United*

<sup>68</sup> See note 55, *supra*. Compare charge of the trial court in *U. S. v. Haupt*, 47 Fed. Supp. 836, 83. (N. D. Ill. 1942), in a passage not criticized upon the reversal of the conviction in 136 F. (2d) 661 (C. C. A. 7th, 1943):

Any intentional act or acts furthering the hostile designs of the enemies of the United States gives aid and comfort and constitutes adhering to such enemies.

\* \* \* An overt act, in criminal law, is an outward act done in pursuance and in manifestation of an intent or design; an overt act in this case means some physical action done for the purpose of carrying out or affecting [sic] the treason.

*States v. Robinson*, "that it is necessary to produce two direct witnesses to the whole overt act", and his dictum that

It may be possible to piece bits together of the overt act, but, if so, each bit must have the support of two oaths \* \* \*

For, assuming the adoption of some definition of the "overt act", a contrary ruling would violate the clearcut decision in the Constitutional Convention to adopt a more strict evidentiary requirement than that under the English statute; as Judge Hand points out.<sup>69</sup> But, this still leaves the critical question of defining the character of the overt act, and Judge Hand brings to the support of his sound evidence ruling certain arguments outside of the record of the Constitutional Convention which suggest that in his mind, the two-witness requirement calls for the strict definition of the act previously urged in his opinion. First,

The requirement of two witnesses probably had its rise from the common law \* \* \*; and in fact heresy and treason were necessarily regarded as closely analogous at a time when the axiom was everywhere accepted, *ejus regio, ejus religio*. \* \* \* Such a

<sup>69</sup> 259 Fed. 685, 692-693: Thus this part of Judge Hand's opinion is approved in the opinion in *U. S. v. Haupt*, 136 F. (2) 661, 675 (C. C. A. 7th, 1943), without any indication by the Circuit Court of Appeals that it would adopt his concept of the overt act. Indeed, in the *Haupt* case, some of the acts charged in the indictment, whose substantive validity is not challenged by the reversal of the convictions, seem to involve conduct which would not necessarily "openly manifest any treason" within Judge Hand's requirement. See 136 F. (2d) at 835.

procedural requirement, wherever it comes from, implies a system of trial not rational in its processes at all, one in which the cause was tried by the sacramental nature of the oath itself (Wigmore, s. 2032), one where the witnesses were guarantors or sponsors for the parties: \* \* \* It would be a complete misunderstanding to suppose that when applied to treason it only meant that the prosecution's witnesses to any overt act should number at least two. In the sense of the rule he is not a witness who testifies only to an isolated and neutral fact, which is relevant because it rationally corroborates the story of a direct witness. When evidence is estimated quantitatively it is the support of the oath that counts, and the witness is no neutral narrator of past truth. He is 'on the side' of him who calls him; he is of 'his tail,' as it were, of his array against the opposite array. It is, of course, quite true that in the ultimate test the jury will decide rationally; but I have now to consider only this formal requirement, which had its origin in other and wholly different ideas. \* \* \* Treason requires two such witnesses to the overt act. It has on this account always been necessary to produce direct, and not enough to produce circumstantial proof. *Rex v. Lowick*, 13 How. St. Tr. 267, 305; *Burr's Case*, 25 Fed. Cas. 55, 476. And so, taken historically, it seems to me no doubt as to the correctness of the defendant's position.<sup>70</sup>

Granting the correctness of this characterization

<sup>70</sup> 259 Fed. 685, 691.



of quantitative rules of proof,<sup>71</sup> it is hard to see its relevance to the interpretation of either the English or the American evidentiary requirements in treason. These were not adopted by men dominated by primitive notions of proof, but by men of hard-headed, practically-founded political experience who were seeking a practical, political result.<sup>72</sup> There seems to be no evidence, and Judge

<sup>71</sup> Note that, as Judge Hand points out, the two-witness rule in canon law was the "ordinary" rule concerning the necessary quantum of evidence in all cases, and—contrary to the impression which may be conveyed at the first meeting of his opinion—was not peculiar to the law of heresy. *Ibid.* This would seem further to reduce the likelihood that adoption of the form of the rule into the law of treason was accompanied by adoption of its original philosophy, which had no special bearing on any offense analogous to treason. See 7 Wigmore on Evidence (3d ed. Boston, 1940) sec. 2032, at p. 242.

<sup>72</sup> The section which Judge Hand cites from Wigmore deals with the history of the general rules of quantitative proof in times when "primitive notions prevailed" (7 Wigmore, p. 243). Concerning the adoption of the English rule, Dean Wigmore relates,

It is clear enough that the rule requiring two witnesses to prove a charge of treason was not a common-law rule, but had its beginning in the statutes of the 1500s \* \* \*. The first statutory provision was that of Edward VI (1547 and 1552) \* \* \*. The immediate circumstances leading to this step were probably the extreme methods used in some of the political trials with which the reign of Henry VIII had just closed. The law of treason had been by this monarch, as never before, wrested to his own personal and arbitrary ends; and (as Sir James Stephen has acutely remarked in another connection) the dominant legislative class, who might not have cared how many a humble subject was unjustly convicted of petty thievery, were well alive to the possibilities of treason law, if

Hand cites none, that when the draftsmen borrowed an old rule for their present, concrete purposes, they in any degree were moved by the ancient philosophy which had originally supported the rule. Judge Hand in effect concedes the unreality of his suggestion when he notes that "of course" the jury will decide rationally; the judges

the rapid turn of the political wheel should chance to bring them underneath; and they probably were moved by the thought of self-protection against the future. As an expedient for this purpose, it was natural that they should seek aid in a rule of numbers. The numerical conception of testimony was then still an instinctive one among all; the ecclesiastical rule of that sort lay plainly in sight, in the spiritual practice; and a rule of numbers was perhaps not only the natural, but to them the only conceivable expedient for providing this protection.

7 Wigmore, *op. cit. supra* note 71, sec. 2036, pp. 263, 264. So, too, he finds the origin of the treason rule in no primitive notions:

The object of the rule requiring two witnesses in treason is plain enough. It is, as Sir William Blackstone said, to "secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politicians in all ages."

*Id.*, sec. 2037, p. 269. So far as the provision in the United States Constitution is concerned, the record of the Convention, though brief, makes clear that the evidentiary safeguard was provided out of a purely rational consideration of probative values; indeed, it would be difficult to find two members of the convention less likely to have been moved by considerations drawn from a system of trial not rational in its processes" (259 Fed. at 691), than Benjamin Franklin and James Wilson, whose remarks alone are recorded on the point. See 7 Wigmore, sec. 2039, p. 272; 259 Fed. at 692-693.

will, of course, likewise decide rationally what is competent evidence to go to the jury. That it has "always been necessary to produce direct, and not enough to produce circumstantial proof" of the act, similarly depends in the cases not on the continuance of an archaic philosophy of proof by oath bearers, but upon a rational relation of means to end: if a special rule of evidence has been provided by statute or constitution, obviously for the protection of the accused, it follows that the admission of evidence should be such as to effectuate this policy. This is plainly the viewpoint from which Mr. Chief Justice Marshall makes the ruling in the Burr trial, which Judge Hand cites in his support:

Collateral points may, say the books, be proved according to the course of the common law; but is this a collateral point? Is the fact, without which the accused does not participate in the guilt of the assemblage if it was guilty, a collateral point? This cannot be. The presence of the party, whose presence is necessary, being a part of the overt act, must be positively proved by two witnesses. No presumptive evidence, no facts from which presence may be conjectured or inferred, will satisfy the constitution and the law. If procurement takes the place of presence and become part of the overt act, then no presumptive evidence, no facts from which the procurement may be conjectured or inferred, can satisfy the constitution and the law.<sup>73</sup>

<sup>73</sup> *U. S. v. Burr*, Fed. Cas. No. 14,693, 25 Fed. Cas. 55, 176 (Ct. D. Va. 1807). Likewise a purely rational

Nor should such a passage as that here quoted from the Burr trial be taken to mean that the overt act must itself be some peculiarly significant act in the execution of the treason; all Marshall is saying is that, whatever is the overt act charged in the indictment, it must be proved by the direct testimony of two witnesses, and not by circumstantial evidence. Thus, if a meeting of conspirators in furtherance of their design is the act charged, the accused's presence is not to be proved by inference from his previous statements that he would be there, or that he did not answer the telephone at home during the time when the meeting was in progress elsewhere; but rejection of such circumstantial evidence in no degree implies that his presence at the meeting, if directly proved

weighing of probative values is the obvious consideration in the passage which Judge Hand cites from *Rex v. Lowick*, 13 How. St. Tr. 267, 305 (1696), where in his charge to the jury Lord Chief Justice Holt states,

Indeed I might have mentioned the evidence of Fisher to you, but that is but circumstantial, and does not come home to the case; but being given it may be mentioned; and that is, about the 8th of February, Fisher had some discourse with Lowick, and it seems there was notice taken of the intended invasion, and Lowick said he would serve his master faithfully; and that the witness thought was meant of the late king; and he said at another time, that he would not discourse with above one at a time, because of the late act of parliament that was then a passing, relating to high treason, that required two witnesses. Now, I say, this is not any proof against the prisoner, but it is a circumstance that may shew his inclination to the late king.

by two witnesses, might not amount to a sufficient overt act.<sup>74</sup>

From the relaxation of the English rule to permit the required two witnesses to testify to distinct overt acts of treason, Judge Hand draws another argument of more realistic character, to suggest that the overt act must be one not innocent on its face. Noting that a similar development occurred in the canon law regarding proof of heresy, he argues

This development of the rule of contestes [i. e., two witnesses to the same individual act of heresy or treason], both in heresy and treason, shows that the pressure of necessity substituted as an avowed, though an unorthodox, equivalent, separate oaths to two separate instances ('overt acts') of the same general character. Yet each of these oaths must directly support one of the several instances ('overt acts'). Moreover, it was always the rule in treason that the jury must believe both witnesses \* \* \*. It scarcely needs much historical imagination to see that, if such an expedient were chosen as a relief from the stringency of the law as it stood, it could only have been because the existing rule demanded the sup-

<sup>74</sup> See Baldwin, Circ. J., in *U. S. v. Doebler*, Fed. Cas. No. 14,977, 25 Fed. Cas. 883, 886 (Circ. Ct. E. D. Pa. 1832):

The constitution and law of the United States require that the overt act should be established by two witnesses, not by the establishment of other facts, from which the jury might reason, to this fact; after this fact is established, other facts may be admitted in the character of corroborative or confirmatory testimony.

port by two witnesses of all the facts making up the specific charge (the 'overt act'). If it meant no more than that one direct witness must be corroborated in the sense that later and more rational procedure understands that word, no need for the equivalent devised as such relief could ever have existed. It is, of course, much harder to obtain one direct witness to each of two several instances than a corroborating witness to some innocent detail of the story of a single witness. Indeed, no prosecution has much chance of success without some corroboration, and the rule, if so interpreted, means in practice nothing whatever.<sup>75</sup>

It is reasonable to regard the English rule, as it eventually developed, as a weaker safeguard to the accused than the rule of the United States Constitution; but this is, after all, a matter of fact, and so far as the opinion shows, Judge Hand's reasoning on the point is *a priori*. The present form of the English rule has been regarded in its home country as representing a very material protection.<sup>76</sup> And Dean Wigmore sees the special virtue of the American rule not in any resultant implication that the overt act must evidence the intent, but in a consideration which

<sup>75</sup> 259 Fed. 685, 691-692 (S. D. N. Y. 1919).

<sup>76</sup> See Best, Evidence, quoted in 7 Wigmore on Evidence, *op. cit. supra*, note 71, sec. 2037, p. 269; cf. 4 Stephen, Commentaries on the Law of England (18th ed. London, 1925) 156, 394; Kenny, Outlines of Criminal Law (15th ed. Cambridge, 1936) 457. As is noted in the text Dean Wigmore regards the present English rule as a relaxation from a desirable strictness, but for a reason which does not support Judge Hand's conclusion. 7 Wigmore, p. 270.



might apply to any conduct sufficient to constitute an attempt according to familiar criminal law standards: namely, that

the opportunity of detecting the falsity of the testimony, by sequestering the two witnesses \* \* \* and exposing their variance in details, is wholly destroyed by permitting them to speak to different acts.<sup>77</sup>

Moreover, Judge Hand's inference from the history of the evidentiary requirement in English law seems inconsistent with two well established rules in the application of the two-witness rule, the validity of which he neither denies nor mentions. Thus, the defendant cannot require the prosecution to establish the treasonable intention by two witnesses. Mr. Justice Iredell answered this contention squarely in charging the jury in the first trial of Fries:

It is the opinion of the counsel for the prisoner that you must be convinced, not only of the fact by two witnesses; not only that he was concerned in a certain act; but that you must have the evidence of two witnesses, at least, by evidence drawn from the same place, that it was done with a treasonable intention, before you can pay any attention to any other evidence whatever. The fact is that, when the overt act is proved by two witnesses, it is proper to go into evidence to show the course of the prisoner's conduct at other places, and the purpose for which he went to that place where the treason is laid, and if he went

<sup>77</sup> Wigmore on Evidence, *op. cit. supra*, note 71, sec. 2037, p. 270.

with a treasonable design, then the act of treason is conclusive.<sup>78</sup>

And in the same case, Judge Peters likewise charged,

Two witnesses are necessary to prove the overt act. But the intent may be proved by one witness, collected from circumstances, or even by a single fact.<sup>79</sup>

Conversely, as the quoted portion of Mr. Justice Iredell's charge also shows, conduct which would suffice as an overt act need not be proved by two witnesses when offered as evidence of intention.<sup>80</sup> Although it is conceivable that the overt act might be required to be such as evidences treason, in order to provide corroboration of the direct evidence of that element, it seems oddly inverted to require stricter proof of the corroborative than of the direct evidence of the facts from which intent is to be inferred.

Finally, the attempt made by Judge Hand in the *Robinson* case and by the defense in *United States v. Cramer*, to require an overt act which "in itself" evidences treasonable intention is of dubious value in perfecting the analysis of the crime, be-

<sup>78</sup> Fed. Cas. No. 5126, 9 Fed. Cas. 826, 914 (Circ. Ct. D. Pa. 1799). Despite the innuendo which might be drawn from his phrasing, it is apparent in the context that Iredell did not mean to imply a requirement of order of proof such as Marshall subsequently rejected in the Burr trial. See note 36, *supra*.

<sup>79</sup> *Id.* 909.

<sup>80</sup> 7 Wigmore, *op. cit. supra*, note 71, sec. 2037, p. 270. See discussion in *U. S. v. Doebler*, Fed. Cas. No. 14,977, 25 Fed. Cas. 883, 885-886 (Circ. Ct. E. D. Pa. 1832), per Baldwin, Circ. J.

cause it rests on an unsound concept of what an act "means". The law treats a physical movement as an act only if it is willed. Thus behind every jural act there is, *ex hypothesi*, some purpose, for it seems psychologically impossible to will a movement without some purpose. Some acts—as, for example, the concentration of attention upon listening to music—may conceivably have a purpose (as distinguished, perhaps, from the more remote question of motive) which in all normal cases may be inferred from observation of the acts alone. This is not a theoretical matter, but is true simply because some acts are capable of serving a narrower range of human satisfactions or designs than others. But when one is dealing with ends as broad as the subverting of a government by domestic disturbance or by aid to its enemies, the range of acts which may fit such purposes is as broad as the possible economic, political, social, racial, sectional, or class factors which affect the health or existence of a community, and in which it may be vulnerable. The acts which may serve to advance purposes of such range will, conversely, be acts which might in another context serve innocent purposes in economic, political, social, racial, sectional, or class dealings. Indeed, so varied is the character of the conduct which may serve the broad purposes penalized by the treason clause, that even the man whose purpose at the concert seems to be the obvious and undivided one of concentrating on the music may be concentrating to hear the one deliberately false note by the first violin, which will convey the message that "the fleet sails tonight." The point

was illustrated in *United States v. Schulze*, a prosecution under the Espionage Act, when the defendant objected to the admission of evidence of statements which he made on other occasions than that which formed the basis of the indictment. The prosecution justified on the ground that the disputed evidence was tendered to prove the defendant's intention in speaking the words which were the basis of the present indictment. Defendant replied with an effort to demonstrate that the statute did not require a showing of intent, because it merely penalized anyone who

shall by word or act support or favor the cause of any country with which the United States is at war, or by word or act oppose the cause of the United States therein.

The trial court properly answered that intent must be an element, because without it words or acts would have no meaning, so that in no case could it be told whether, even in an objective sense, they supported or favored the enemy:

Intent is a necessary element of this offense, notwithstanding the absence of the words "willfully" and "intent". Words spoken in one set of circumstances may mean an entirely different thing from words spoken in another set of circumstances. If the American army are advancing and the Huns are retreating, and I say, "We cannot always hope to win", that is pessimistic. If the Huns are advancing, and the Americans are retreating, and I say, "We cannot always hope to win", that is optimistic. In order for the government to prove the crime, the govern-

ment must give color to the words. One cannot look at these words uttered by the defendant, and say that they necessarily favor the cause of Germany. Some of the sentences would not convey that meaning at all, without intent being shown.<sup>81</sup>

<sup>81</sup> 253 Fed. 377, 379 (S. D. Cal. 1918), aff'd without reference to this basis of decision, 259 Fed. 189 (C. C. A. 9th, 1919).

The tight-knit analysis presented in Hall, Criminal Attempt, (1940) 49 Yale L. J. 789, 824-825, considers, and rejects, as a test of the proximity of act to accomplished crime the criterion stated by Salmond, that "An attempt is an act of such a nature that it is itself evidence of the criminal intent with which it is done." Hall comments,

Isolated behavior is always ambiguous so far as legal significance is concerned. A person carries a gun in his possession. Is his purpose to defend himself, to hunt or to kill a man? An individual is caught just after he has unlatched a window in a dwelling house. Is his intention to steal or to keep a rendezvous? Ambiguity is sometimes much reduced, as, for example, when a passenger in a subway train places his hand in another's pocket. Even here the act alone does not necessarily mean a criminal intent, or, at least, any particular criminal intent. The passenger may have been a creditor trying to recover his own property or its equivalent; or, if the pocket were a lady's, the purpose may have been lewd rather than larcenous. We cannot say until we know the relevant facts and circumstances. The unequivocal test is, accordingly, invalid because it arbitrarily confines judgment as to intention to a narrowly circumscribed "act". This is not done, and it would be unwise to judge on such rigorously restricted evidence. As a consequence, it would, as seen, impose liability for non-criminal acts, and, on the other hand, it would too long defer liability. Hence the assertion that

In theory, no act has a meaning in itself, in the sense of a significance which can be grasped by observation of the act alone; in practice, one understands the meaning of acts he observes in most cases because he knows other facts in context with the observed acts, and this is particularly likely to be so in dealing with the kind of purposes penalized by the treason clause, since they may be served by manifold acts which can also serve many other purposes. That an act is not "innocent in itself" or evil in itself, but derives its meaning from the context of conduct and circumstances in which it occurs, is shown both by the fact that acts may be found treasonable which on their face are "innocent",<sup>82</sup> and that

"an act which is in itself and on the face of it innocent, is not a criminal attempt" is untenable. It has long been held that an act might be quite innocent in itself, but found to express a criminal intention on knowledge of surrounding circumstances.

This comment is the more pertinent, since Hall recognizes that "treason" is in its nature an attempt, and indeed, probably the source of the general law of attempts. *Id.*, 794-797.

\* See *U. S. v. Lee*, Fed. Cas. No. 15,584, 26 Fed. Cas. 907 (Circ. Ct. D. C. 1814) (purchase of provisions, intended for enemy); *U. S. v. Greathouse*, Fed. Cas. No. 15,254, 26 Fed. Cas. 18 (Circ. Ct. N. D. Cal. 1863) (fitting out a sailing vessel, when intended to act as a privateer); *Hanauer v. Doane*, 12 Wall. 342, 20 L. Ed. 439 (U. S. 1871) (sale of goods, when intended for enemy use); *U. S. v. Fricke*, 259 Fed. 673 (S. D. N. Y. 1919) (holding of funds on deposit, or borrowing money, when for convenience of enemy agent); *U. S. v. Werners*, 247 Fed. 708 (E. D. Pa. 1918) (words); *U. S. v. Haupt*, 136 F. (2d) 661 (C. C. A. 7th, 1943) (holding funds, securing lodgings, furnishing mailing address, when for convenience of enemy agent).



acts which on their face appear treasonable may be found innocent.<sup>83</sup> If acts could have meaning in themselves, it is hard to see why in the centuries of experience represented by the criminal law it has been found necessary or desirable to

<sup>83</sup> See *U. S. v. Hodges*, Fed. Cas. No. 15,374, 26 Fed. Cas. 332 (Circ. Ct. D. Md. 1815) (delivery of prisoners to enemy); *U. S. v. Hoxie*, Fed. Cas. No. 15,407, 26 Fed. Cas. 397 (Circ. Ct. D. Vt. 1808) (armed clash with troops seeking to enforce national embargo); *U. S. v. Hanway*, Fed. Cas. No. 15,299, 26 Fed. Cas. 105 (Circ. Ct. E. D. Pa. 1851) (forcible resistance to execution of Fugitive Slave Law); *U. S. v. Magtibay*, 2 Philipp. 703 (1903) (duress); *U. S. v. Leiner*, Cr. No. 113-120, S. D. N. Y., 1943 (unreported) (mis-statements to authorities regarding identity of spy). Distinguish cases where the prosecution fails because the acts shown are not deemed sufficiently advanced in execution of the intent: *K. S. v. Pryor*, Fed. Cas. No. 16,096, 27 Fed. Cas. 628 (Circ. Ct. D. Pa. 1814); *U. S. v. De Los Reyes*, 3 Philipp. 349 (1904).

There is no more striking example of conduct on its face clearly treasonable, but in fact found innocent, than the case of Joshua Hett Smith. Smith, a resident of the West Point area, arranged to have two of his tenants row him on the night of September 21, 1780 to the British sloop *Vulture*, lying in the Hudson. He hailed the vessel as a friend, boarded her, and was aboard for 15-20 minutes, after which he returned to the rowboat accompanied by Major Andre, whom he then brought ashore for the meeting with Arnold. Smith took Andre to his house and furnished him with the civilian coat which Andre wore at the time of his capture. Smith was tried before a court martial convened under a resolution of the Congress authorizing the commander in chief thus to try any citizen who should harbor or secrete any of the subjects or soldiers of Great Britain, knowing them to be such, or should be instrumental in conveying intelligence to the enemy. His defense, apart from a challenge to the jurisdiction of the court martial, was that Arnold had

develop the concept of intent as a separate element of crimes, as in treason.<sup>84</sup>

Of course, even though it be held proper in theory that the "overt act" be simply some step in execution of the intent, and not such as necessarily evidences the intent, one might emerge with the practical result of requiring the latter, if he insisted that the act be very far along in execution. For the closer the act is to accomplishment, the more likely that it will in fact be some evidence of intent. But the cases have not pressed the matter to this point, and those involving charges of adherence to the enemy have been markedly liberal in applying what seems the familiar technique of the law of attempts. Such ordinary commercial transactions as purchasing goods, holding money on deposit, provisioning a ship, and borrowing from a bank have been held

enlisted his aid on the pretext that this was a means of obtaining information helpful to the American cause. The most careful student of the Arnold conspiracy apparently believes that Smith was telling the truth. Van Doren, *Secret History of the American Revolution* (N. Y. 1941) 330, 331, 337. The court martial acquitted the defendant, finding that although he had aided Arnold,

yet they are of opinion, that the evidence is not sufficient to convict the said Joshua H. Smith of his being privy to, or having a knowledge of, the said Benedict Arnold's criminal, traitorous and base designs.

See *The Trial of Joshua H. Smith for assisting the enemy*, Tappan, New York, September, 1780, 6 *American State Trials* (Lawson, ed. St. Louis, 1916) 486; 2 *Chandler American Criminal Trials* 255 (Boston, 1844); Smith, *An Authentic Narrative of the Causes which lead to the death of Major Andv* (N. Y. 1809) 118.

<sup>84</sup> See notes 28-39, *supra*.

sufficient overt acts, where they were linked with an intention thereby to give aid and comfort to an enemy.<sup>85</sup> There seems no logical reason why a meeting might not be a sufficient overt act, whether its purpose be simply to plan future activity, or whether it serves as a means to effectuate plans already or then and there formulated. The authority is firm, however, that a meeting to plan to subvert the government is not an overt act of treason; this is "conspiracy to levy war", and ever since Lord Coke pronounced it no treason, his dictum, given without satisfactory explanation save as such may be inherent in the phrase "levying war", has been religiously followed.<sup>86</sup> There is no comparable line of historical authority against a meeting to plan the giving of aid and comfort to an enemy, as a sufficient overt act. And it seems taken for granted that harboring an enemy agent is a sufficient overt act of adherence, though the line between this and a meeting to plan the giving of aid might become quite shadowy.<sup>87</sup> If the meeting is not to plan, but to effectuate a plan; or even if the meeting is to plan, but in addition is brought together in a state of readiness forthwith to execute such plan as may be made, this is a sufficient overt act even under

<sup>85</sup> See note 82, *supra*.

<sup>86</sup> See Marshall, C. J., in *Ex parte Bollman*, 4 Cranch 75, 126, 2 L. Ed. 554, 571 (U. S. 1807).

<sup>87</sup> This is one of the overt acts charged in *U. S. v. Haupt*, in an indictment the substantive validity of which was not involved in the reversal of the convictions. 47 Fed. Supp. 836, 839 (N. D. Ill. 1942), 136 F. (2d) 661 (C. C. A. 7th, 1943).

the charge of levying war." In *United States v. Greathouse*, the assembling of the ship's company aboard a vessel intended as a privateer, but not yet so equipped, seems to be treated as a sufficient overt act of itself." The intent of course will always determine the criminality of meeting, and thus if the sole evidence on this score is of a meeting with a known rebel or enemy, with no evidence of intent that the meeting serve any purpose of the rebel or enemy, the most that could be made out would be misprision of treason. Moreover, the nature of "war" is that it is a collective activity, and this serves to explain in part at least Marshall's well known remarks on the necessity of an assemblage: individual action may amount to levying war when men are already

\* See *U. S. v. Mitchell*, Fed. Cas. No. 15,788, 26 Fed. Cas. 1275, 1278 (Circ. Ct. D. Pa. 1795); *Case of Fries*, Fed. Cas. No. 5126, 9 Fed. Cas. 826, 914 (Circ. Ct. D. Pa. 1799) (first trial) s. c., Fed. Cas. No. 5127, id., 924, 931 (Circ. Ct. D. Pa. 1800) (second trial); *Ex parte Bollman*, 4 Cranch 75, 134, 2 L. Ed. 554, 553 (U. S. 1807); *U. S. v. Burr*, Fed. Cas. No. 14,692a, 25 Fed. Cas. 2, 14 (Circ. Ct. D. Va. 1807) and s. c., Fed. Cas. No. 14,693, id., 55, 165, 168; Charge to Grand Jury, Fed. Cas. No. 48,263, 30 Fed. Cas. 1915 (D. Mass. 1851); *U. S. v. Haupt*, 47 Fed. Supp. 836, 839 (N. D. Ill. 1942), rev'd on grounds not affecting the substance of indictment, 136 F. (2d) 661 (C. C. A. 7th, 1943); cf. *U. S. v. Stephan*, 133 F. (2d) 87, 93, 94 (C. C. A. 6th, 1943). But cf. Story, Cir. J., in charge to Grand Jury, Fed. Cas. No. 18,275, 30 Fed. Cas. 1046, 1047 (Circ. Ct. D. R. I. 1842); Grier, Cir. J., in charge to jury in *U. S. v. Hayway*, Fed. Cas. No. 15,299, 26 Fed. Cas. 105, 126 (Circ. Ct. E. D. Pa. 1851).

\* Fed. Cas. No. 15,254, 26 Fed. Cas. 18, 24 (Circ. Ct. N. D. Cal. 1863).

waging a war, but in no fair sense of the term can the isolated acts of an individual be said to constitute war against a state.<sup>90</sup> But he is also unwilling to overrule ancient authority rejecting conspiracy to levy war as a sufficient overt act, and hence he insists that the assemblage be in present force. Despite some ambiguous references to this force as evidencing the intention behind the assemblage, in their total context, his remarks reflect a basic policy of insisting, as would the law of attempts, that defendants be shown to have had some minimum capacity in fact to do harm such as makes them dangerous.<sup>91</sup>

<sup>90</sup> See *U. S. v. Burr*, Fed. Cas. No. 14,693, 25 Fed. Cas. 55, 165, 168 (Cir. Ct. D. Va. 1807).

<sup>91</sup> For the underlying emphasis on the fact of capacity to do harm, rather than on the armed assembly as evidence of intent, see *U. S. v. Burr*, loc. cit. supra note 90, p. 169:

the court [in the Bollman opinion] unquestionably did not consider arms as an indispensable requisite to levying war. An assemblage adapted to the object might be in a condition to effect or to attempt it without them. Nor did the court consider the actual application of the force to the object as at all times an indispensable requisite; for an assemblage might be in a condition to apply force, might be in a state adapted to real war, without having made the actual application of that force. From these positions, which are to be found in the opinion, it may have been inferred, it is thought too hastily, that the nature of the assemblage was unimportant; and that war might be considered as actually levied by any meeting of men, if a criminal intention can be imputed to them by testimony of any kind whatever.

Such passages cast a different light on the emphasis in the following familiar remarks (*Ibid.*) which, viewed



Some additional light, in attempting to define the function of the overt act element, and the consequent nature of the evidence sufficient to establish the overt act, may be obtained by considering the function of the intent element in the crime of treason. Obvious as is the function of the latter, it seems quite forgotten in the ingenious theory woven by Judge Hand in the *Robinson* case and the defense in the *Cramer* case to explain why the act must evidence the intent. The more or less explicit justification of that theory is that it is necessary to protect the innocent from wrongful convictions: in treason, unlike conspiracy, Judge Hand declares, the act requirement "affected the character of the pleading and proof, rather than accorded a season of repentance before the crime should be complete."

Previous analysis has suggested that the cases uniformly treat the act and intent elements of the in isolation, might seem to imply that the reason for insisting on an assemblage in force is to show intention only:

Before leaving the opinion of the supreme court entirely, on the question of the nature of the assemblage which will constitute an act of levying war, this court cannot forbear to ask, why is an assemblage absolutely required? Is it not to judge in some measure of the end by the proportion, which the means bear to the end? Why is it that a single armed individual entering a boat and sailing down the Ohio for the avowed purpose of attacking New Orleans, could not be said to levy war? Is it not that he is apparently not in a condition to levy war? If this be so, ought not the assemblage to furnish some evidence of its intention and capacity to levy war before it can amount to levying war?



crime as distinct, creating a strong inference that they are intended to serve different ends; that the cases likewise are almost unanimous in suggesting that the function of the overt act element is, as in other crimes, to demonstrate that defendant had moved from the realm of thought into that of execution; and that, although it would not be irrational to define the overt act element so that it will serve to corroborate the intent, there are sound reasons against this, so that the burden of proof is upon him who asserts it. This analysis seems reinforced when the cases further reveal a marked tendency to define the intent element with considerable care, with the effect of setting at least as definite bounds to the offense as result from all the talk about the overt act, if not more so.

"Treason" means a betrayal of allegiance, owed either because of citizenship or because of lawful presence under protection of the laws. The idea of betrayal connotes a specific intent, and this is the line of development of the American as well as of the modern English cases. Most of the excesses of the English law of treason, prior to the 18th century, can be described in terms of a treasonable intent found by inference under the lead of compassing the death of the king; men were convicted not on evidence fairly showing that they had planned the king's death and the overthrow of the government, but on the basis of expression or advocacy of ideas or measures whose "natural" consequences, as deduced by their political foes, might involve harm to the king or the state.<sup>93</sup> The overwhelming evidence is that

<sup>93</sup> See 8 Holdsworth 327 ff.

the treason clause of the United States Constitution was intended to limit the scope of that offense; and, as we have seen, that is the admonition of policy on which the courts of this country have centered ever since. As the treason clause is the product not of theory, but of history, the practical meaning of its restrictive policy should be drawn from history. The most obvious manner in which the Constitution narrows the scope of treason is by omitting any analogue of the crime of compassing the king's death. Since most of the reprobated doctrines of the English law had developed under that head, it makes historical sense to look there for the kinds of doctrine which the framers wished to bar from the American law of "treason". There is of course some truth in the observation that the crime of compassing had no ready analogy in a republic; but to treat this as more than a minor factor would be to substitute bloodless logic for living policy.

In this light, it is the raising of a treasonable intent from inferences drawn at second or third hand, or worse, together with the closely related matter of punishing men as traitors merely for the expression or peaceful advocacy of unpopular ideas, which were the historic targets of the framers' restrictive policy. The second matter has been taken care of by a strict insistence, dating back to Coke, that the mere speaking of words is not an "overt act", however clear the intention; and by now this seems to have crystallized into a firm doctrine that neither written nor spoken expression of ideas or advocacy of opinions

is, without more, a sufficient overt act within the meaning of the treason clause.<sup>94</sup> The first evil has, on the other hand, been dealt with by a clear tendency in the cases to require a showing of specific intent. Texts sometimes assert that a specific intent is not necessary, to make out "treason".<sup>95</sup> As has been pointed out, such a proposition disregards the fact that the holding of a man to the "natural" treasonable consequences of his conduct is the very technique by which the reprobated "constructive treasons" were raised. There is loose language in some opinions, it is true, to the effect that one accused of treason may not disavow the natural consequences of his act, by pleading that he sought merely a commercial profit by selling supplies to an enemy or rebel, or that he helped an enemy or rebel agent merely out of friendship or compassion.<sup>96</sup> The critical fact in

<sup>94</sup> See cases cited in note 50, *supra*.

<sup>95</sup> See, e. g., Miller, *Criminal Law* (St. Paul, 1934) 502. Apart from its inconsistency with the history of the American law of treason, this proposition seems contrary to the familiar doctrine that a specific intent is necessary in crimes of the nature of an attempt. See Keedy, *Ignorance and Mistake in the Criminal Law* (1908) 22 *Harv. L. Rev.* 75, 89; Sayre, *Criminal Attempts* (1928) 41 *id.* 821, 822, 844; Skilton, *Mental Element in Criminal Attempt* (1937) 3 *Univ. of Pitts. L. Rev.* 181, 182; Turner, *Attempts to Commit Crimes* (1934) 5 *Cambr. L. J.* 230, 235; cf. Harbo, *Intent in Criminal Conspiracy* (1941) 89 *U. Pa. L. Rev.* 624, 636, 637.

<sup>96</sup> See e. g., *U. S. v. Horie*, Fed. Cas. No. 15,407, 26 Fed. Cas. 397, 398 (Circ. Ct. D. Vt. 1808); trial court charge in *U. S. v. Stephan*, 50 Fed. Supp. 738, 744 (E. D. Mich. 1943). John Brown's defense to the charge of treason by levying war against the state of Virginia was, in part,

such situations, however, would seem to be the defendant's knowledge that he is dealing with the foe. If he has such knowledge, then in fact when he sells, supplies or gives money or concealment, he intends to do the prohibited act—to aid the enemy. The plea of profit or friendship goes not to his intention, but to his motive; and it is merely applying elementary doctrine to hold that if defendant had the specific intention to bring about a result which the law seeks to prevent, his motive is irrelevant.<sup>27</sup> Of course the mercy of

that he had no intent further than "to free slaves". See *The Trial of John Brown*, 6 American State trials (Lawson, ed. St. Louis, 1916) 798, 801, 802. There was evidence, however, that Brown had envisioned his effort to help the slaves as possibly involving the creation of a separate commonwealth, and although he seems to have raided Harper's Ferry with no well thought-out plan for the steps to follow, his intent seems plainly to have embraced such overturning of existing institutions as might be necessary "to free slaves". See Warren, *John Brown* (N. Y. 1929) 350, 384; Villard, *John Brown* (Rev. ed. N. Y. 1943) 427.

<sup>27</sup> Thus the profit motive does not excuse selling provisions to the enemy. *U. S. v. Lee*, Fed. Cas. No. 15,584, 26 Fed. Cas. 907 (Cir. Ct. D. C. 1814); *Hanauer v. Doane*, 12 Wall. 342, 20 L. Ed. 439 (U. S. 1871); *Carlisle v. U. S.*, 16 Wall. 147, 21 L. Ed. 426 (U. S. 1873); *Spratt v. U. S.*, 20 Wall. 459, 22 L. Ed. 371 (U. S. 1874). And the mingling of friendship or sympathy for the known enemy with the intent to aid him, knowing him an enemy, does not negative the treasonable intent. *U. S. v. Stephan*, 50 Fed. Supp. 744, note (E. D. Mich. 1943), 133 F. (2d) 87, 99 (C. C. A. 6th, 1943); *U. S. v. Cramer*, 137 F. (2d) 888, 893 (C. C. A. 2d, 1943). Nor does hostile duress acting on other persons than defendant, or directed at property, justify giving aids. *U. S. v. Hodges*, Fed.

juries is always an incalculable factor here, and one deliberately preserved in our system.<sup>98</sup>

Apart from the difficult question of mixed motive, the tendency of the cases to insist on specific intent in treason means a rejection of intention which amounts merely to holding a man for the "natural" consequences of an intention not proximately aimed at the subverting of the government or the giving of aid and comfort to enemies. The strongest assertion of this tendency has been in the cases involving charges of levying of war by forcible opposition to the execution of a single statute or other act of authority. The English decisions prior to the middle of the 18th century went far in finding that riotous assemblies for any

Cas. No. 15,374, 26 Fed. Cas. 332 (Circ. Ct. D. Md. 1815); *U. S. v. Pryor*, Fed. Cas. No. 16,096, 27 Fed. Cas. 628 (Circ. Ct. D. Pa. 1814). Cf. *U. S. v. Hughes*, Fed. Cas. No. 15,418, 26 Fed. Cas. 420 (S. D. Ohio, 1864), and *Thompson, A Treason Trial in Ohio (1883)* 4 Ohio Bar Assn. App. 133.

A contrary doctrine concerning sale of supplies to the enemy might seem to have evolved in the Confederate States of America. Though originally regarded as clearly involving treason, trade with the enemy there "came to be more generally regarded as an offense against the revenue laws than as an act of treason." Robinson, *Justice in Grey* (Cambridge, 1941) 177. The circumstances strongly suggest, however, that this course of opinion reflected a practical compromise with facts; such trade as was going on seemed probably of greater benefit to the South than to the North.

<sup>98</sup> Thus despite the confused argument of Pinckney for the defense, and the unsatisfactory charge of Duval, Circ. J., the issue of motive seems the real defense attempted in *U. S. v. Hodges*, cited note 97, *supra*, and the jury's verdict of acquittal may amount to interposition of mercy.

non-private purpose amounted to constructive levying of war; and this was so *a fortiori* if the object of the mob could be said to be to prevent by force the execution or procure the repeal of some official act.<sup>99</sup> That the latter is likewise treason under the Constitution was established in the cases arising out of the Whiskey Rebellion in 1794 and the Pennsylvania resistance to the federal property excise in 1799.<sup>100</sup> But even Federalist-minded judges laid down the law with significant and reiterated emphasis on the need for finding that the force was exerted for a general and public purpose and not merely to stop the collection of particular levies, or collection from particular persons only, or by a particular exciseman only.<sup>101</sup> In 1808, in *United States v. Hoxie*, Livingston, Circuit Justice, in effect directed a verdict on the basis that the conveying of a raft of logs to Canada, in violation of the Embargo, and with armed opposition to the troops seeking to enforce it, was not shown to be more than a particular violation

<sup>99</sup> See 8 Holdsworth 335 ff.

<sup>100</sup> See Paterson, Circ. J., in *U. S. v. Vigol*, Fed. Cas. No. 16,621, 28 Fed. Cas. 376 and in *U. S. v. Mitchell*, Fed. Cas. No. 15,788, 26 Fed. Cas. 1277; Iredell, Circ. J., and Peters, D. J., in *Case of Fries*, Fed. Cas. No. 5126, 9 Fed. Cas. 826, 840, 909, 912, and Chase, Circ. J., in the second trial of Fries, Fed. Cas. No. 5127, *id.*, 924, 930. Needless to say, the Jeffersonian Congress' impeachment of Mr. Justice Chase was not based on any objection to such parts of his charge to the jury in the Fries trial as confined the definition of treasonable intention; and, significantly, Chase's answer to his impeachment boldly makes capital out of the fact that his refusal to allow defense counsel to describe early English treason law to the jury was based on its excessive scope, both in intent and in act. See 2 Fed. Cas. 938 ff.



of law for profit, and hence was not treason for lack of the requisite intent. Emphasizing the agreement of men learned in the law upon "the exceptions, which have been so cautiously interwoven into" the doctrines regarding levying of war, "for the very purpose of preventing their extension to cases of this kind", he notes that it may sometimes be hard to distinguish between treason and some other offenses involving opposition to authority.

But, difficult as this may be, every one will at once perceive a very wide separation, between regular and numerous assemblages of men, scattered over a large portion of country, under known officers, and in every respect armed and marshalled in military and hostile array, for the avowed purpose, not only of disturbing and arresting the course of public law, in a whole district, by forcibly compelling the officers of government to resign, but by intimidation and violence, of coercing its repeal, and a sudden, transient, weak, unmilitary, and unsystematized resistance, and that in a solitary instance, and for the single object of personal emolument.<sup>101</sup>

<sup>101</sup> Fed. Cas. No. 15,407, 26 Fed. Cas. 397, 400, 402 (Circ. Ct. D. Vt. 1808). Livingston's ruling is the more striking because, though the particular enterprise was only a somewhat unusually open and brash smuggling attempt, it probably represented a type of conduct which then met with the approval of a substantial part of the community, which was violently opposed to the Embargo. A different temper of mind towards the scope of "treason" might have led the court to find that a case existed. Cf. Moulton, *A Vermont Treason Trial* (1935) 29 Vt. Bar Assn. 121, 128-132.

Livingston's concentration is here entirely on the intent element as the safeguard against extension of the crime by inference?

In what can we discover the treasonable mind, which common sense, as well as all the authorities tell us, is of the very essence of this offence?

\* \* \* \* \*

These learned judges also consider the intention as the only true guide in ascertaining whether certain acts amount to treason, or a less offence, and regard the universality, or generality of the design, as forming an essential ingredient in the composition of this crime.<sup>102</sup>

Mr. Justice Livingston had thus employed a careful insistence on the specific intent, to ensure that mere resistance to lawful authority and ordinary crime would not be treated as a levying of war. In *United States v. Hanway*, Mr. Justice Grier, on circuit, developed another facet of a carefully defined specific intent, by emphasizing that treason was inherently a crime of deliberate, pre-conceived intention; mere presence in a riotous assembly or sudden, impulsive joining in damage wrought, would not raise an adequate inference of participation in a design to levy war. Under what amounted to a direction by the court, the jury acquitted defendant of the charge of levying war by participation in a forcible effort to prevent the taking of escaped slaves under the Fugitive Slave Law. As has been already noted, Mr. Justice Grier raised a doubt whether, under the policy indicated by leading English decisions

<sup>102</sup> *Id.*, 399, 401-402.

in the generation preceding adoption of the Constitution, a rising against the execution of a particular law was enough to show treasonable intent, or whether the design must not be wholly to subvert the government.<sup>103</sup> But, at any rate, a calculated and general intention, directed to a public and not merely a particular or private object, must be shown; and despite lengthy condemnation of the riot which had occurred, causing the death of one man, the Circuit Justice was of the opinion that it was not treason:

Not because the numbers or force was insufficient. But (1) for want of any proof of previous conspiracy to make a general and public resistance to any law of the United States; (2) because there is no evidence that any person concerned in the transaction knew there were such acts of congress, as those with which they are charged with conspiring to resist by force and arms, or had any other intention than to protect one another from what they termed "kidnappers" (by which slang term they probably included not only actual kidnappers, but all masters and owners seeking to recapture their slaves, and the officers and agents assisting therein).

The testimony of the prosecution shows that notice had been given that certain fugitives were pursued; the riot, insurrection, tumult, or whatever you may call it, was but a sudden "conclamatio" or running together, to prevent the capture of certain of their friends or companions, or to rescue them if arrested. Previous to this transaction, so far as we are informed, no at-

<sup>103</sup> See note 26, *supra*.

tempt had been made to arrest fugitives in the neighbourhood under the new act of congress by a public officer.<sup>104</sup>

Since Grier notes that defendant was "confessedly present" at the disturbance, and that being present and aiding makes one a principal in treason (as, indeed, in other felonies), it seems clear that he does not question the sufficiency of presence as an overt act, but is concentrating on the intent.

In the present case, Hanway was confessedly present. But did he come to aid.

<sup>104</sup> Fed. Cas. No. 15,299, 26 Fed. Cas. 105, 128 (Circ. Ct. E. D. Pa. 1851). Insistence on specific intent underlies Grier's admission of defense evidence that in the previous nine months there had been rough seizure of Negroes in the neighbourhood by men of dubious character, acting without show of official authority. This was recognized as a critical point, and was hard fought, on both sides. See Hensel, *The Christiana Riot and the Treason Trials of 1851* (Lancaster, 1911) 78. The prosecution objected that the evidence was irrelevant. Grier answered (p. 112).

The objection of the prosecution would be irresistible if Hanway was indicted simply for resisting an officer of government. But in treason there must be some previous agreement.

So also Grier and Kane, D. J., agreed that the prosecution, not having previously supplied the defense with a list of the witnesses on the spot as the statute required, could not now introduce "rebuttal" evidence that for the year previous armed bands of Negroes had ranged the neighbourhood seeking out whites trying to reclaim slaves. Judge Kane declared (p. 114), that:

The two elements of the crime are the act and the preconcert. . . . The evidence which is now offered is merely to prove that preconcert. It was an indispensable element of the original case.

abet, countenance or encourage the rioters? \* \* \* If \* \* \* as is argued by his counsel, he came there without any knowledge of what was about to take place, and took no part by encouraging, countenancing, or aiding the perpetrators of the offence—if he merely stood neutral through fear of bodily harm, or because he was conscientiously scrupulous about assisting to arrest a fugitive from labour, and therefore merely refused to interfere, while he did not aid or encourage the offenders.

Grier says he may be guilty of a breach of morals or a misdemeanor for not aiding the officials, but not of treason, though

\* \* \* such conduct is a fair subject for the consideration of a jury, in connection with other circumstances; to show preconcert and guilty complicity with the rioters, murderers or traitors.<sup>108</sup>

In addition, further casting the protection of a cautiously defined intent element about the defendant, Grier charges the jury as Livingston did in the *Hoxie* case, that mere breach of the law, as by smugglers resisting the revenue officers, though necessarily involving forcible opposition to authority, is not treason. His evident distaste for the doctrine of constructive levying of war leads him practically to read it out of the scope of treason as that offense had been defined in the early English cases:

A whole neighbourhood of debtors may conspire together to resist the sheriff and his officers, in executing process on their prop-

<sup>108</sup> *Id.*, 126.



erty—they may perpetrate their resistance by force of arms—may kill the officer and his assistants—and yet they will be liable only as felons, and not as traitors. Their insurrection is of a private, not of a public nature; their object is to hinder or remedy a private, not a public grievance.<sup>106</sup>

The new climate of policy reflected in the *Horie* and *Hanway* cases is the more striking, since both prosecutions were brought as test cases by administrations eager to obtain the support of

<sup>106</sup> *Id.*, 128. Grier's observations are the more striking in view of the clarity with which District Judge Kane—who sat with Grier in the *Hanway* trial—had charged the Grand Jury on the theory that an attempt by force generally to prevent the enforcement of a single law was treason by levying war. See Fed. Cas. No. 18, 276, 30 Fed. Cas. 1047, 1048 (Circ. Ct. E. D. Pa. 1851). Judge Kane, a former district attorney and Attorney General of Pennsylvania, was herein merely reflecting his "well known views" on the need for strict enforcement of the constitutional right of slave owners to the return of their property. See Hensel, *op. cit. supra*, note 104, pp. 57-58. Justice Grier's evident distaste for the doctrine of constructive levying of war is further pointed by the contrast of his remarks with the clear presentation of the broader doctrine by the district attorney in his address to the jury. See Robbins, *Report of the Trial of Castner Hanway* (Philadelphia, 1852) 45, 53. Contrast also with Mr. Justice Grier's sweeping exclusion of the mortgage debtor's case the resort to force to stop the general operation of the mortgage foreclosure system in farm states at the depth of the depression of the 1930's. See Skilton, *Government and the Mortgage Debtor* (1929 to 1939) (Philadelphia, 1944) 74. So far as appears, no effort was ever made to charge these disturbances as constructive levying of war, though they seem within the scope of the older English authority.



favorable decisions for hotly controverted public policies. In this light, it is significant that the grounds on which President Adams decided to pardon those convicted in the earlier "state trial" of Fries and his companions amount also to an insistence that a levying of war can be established only on a showing of a specific intent to overthrow the government.<sup>107</sup>

<sup>107</sup> Attorney General Rodney recommended that the charge of treason be laid in the Hoxie case, as a salutary check on the New England opposition to the Embargo, which had progressed to the point that Jefferson had proclaimed a state of insurrection and had called out the militia to enforce the law. See Cummings and McFarland, *Federal Justice* (N. Y. 1937) 68; Moulton, *op. cit. supra*, note 101. The Hanway case arose at a time when conservative Northern opinion was anxious to show to the South evidence of the good faith and practicability of the Fugitive Slave Law as a partial answer to the Abolitionist agitation and the underground railroad. The apparent opportunity to make an early "example" led the Federal authorities to press the treason charge over the efforts of the state to assert its jurisdiction to prosecute for murder or at least riot. See Smith, *Parties and Slavery* (N. Y. 1906) 23, 24; Warren, *Supreme Court in United States History* (Rev. ed. Boston, 1935) 229-230; Hensel, *op. cit. supra*, note 101, p. 62. Cf. pamphlet, by A. Member of the Philadelphia Bar, *History of the Trial of Castner Hanway* (Philadelphia, 1852) 84-85. The earlier, and more successful, resort to the broad doctrine of levying of war, in the Whiskey Rebellion cases likewise reflected a deliberate decision by the administration to employ the dread charge of "treason" as a salutary check to undesirable political tendencies. There is no evidence that the Federalists stirred the insurrection, but they seized on it with obvious relish as a means of tarring their opponents with the stigma of treason. See Baldwin, *Whiskey Rebels* (Pittsburgh, 1939) 266, 269-270. It is only fair, however,

Reported decisions indicate but one attempt to use the charge of treason by levying war, since

to note that at its peak, the disaffection was close to a state of levying of war even in the strict sense of the term. *Id.*, Ch. VII.

President Adams' pardon of Fries and his fellows, after their conviction of treason for the forcible rescue from the Federal marshal of prisoners arrested under the hated property excise in 1799, seems to involve in substance an executive construction of the crime of levying war analogous to Mr. Justice Grier's insistence on pre-concert and specific intention to overthrow constituted authority. The questions which Adams posed to his heads of department, in seeking their advice on his disposition of Fries' petition for pardon indicate clearly the bent of the President's mind:

\* \* \* 4. Is it clear beyond all reasonable doubt that the crime of which they stand convicted, amounts to a levying of war against the United States, or, in other words, to treason? \* \* \* 6. *Quo animo* was this insurrection? Was it a design of general resistance to all law, or any particular law? Or was it particular to the place and persons? 7. Was it anything more than a riot, high-handed, aggravated, daring, and dangerous indeed, for the purpose of a rescue? This is a high crime, but can it strictly amount to treason? 8. Is there not great danger in establishing such a construction of treason, as may be applied to every sudden, ignorant, inconsiderate heat, among a part of the people, wrought up by political disputes, and personal or party animosities? \* \* \*

9 Works of John Adams (Boston, 1836) 58. Though he received unanimous advice, that the case was properly held treason and did not in that light establish any undesirable precedent, Adams gave a pardon by proclamation, May 21, 1800. *Id.*, 178. In a letter of March 31, 1815 to James Lloyd, justifying his conduct, Adams stated that his "judgment was clear, that their crime did not amount

the Civil War.. This has not been for lack of occasions on which, at least under the 17th and

to treason", and then repeated the substance of point "7" in his memorandum to the heads of departments. He also indicates, however, that his judgment was based largely on his appraisal of the defendants as ignorant of the nature of what they did. *10 id.* 153, 154. His attitude towards the charge of "treason" against Fries is the more striking because of his strong condemnation of the disturbances, as reflected in his memorandum to the heads of departments, and in his letter to Jefferson, June 30, 1813. *Id.*, 47. 2 Adams. *Life of John Adams* (Philadelphia, 1871) 314-318, 1 Works. *op. cit. supra*, pp. 571-574, discusses the pardon, and comments (Life, 317, n.) that "The view of treason opened in this case there is no room here to consider. It must infallibly come up for revision at some time or other in the courts of the United States." Cf. Walters, Alexander James Dallas (Philadelphia, 1943) 79 ff.; (Note), 9 Fed. Cas. 944-947. Washington's pardons to those convicted in the Whiskey Rebellion cases apparently imply no similar doubt as to the policy of the legal doctrine under which the convictions were obtained, but represent the ordinary exercise of executive clemency. The leaders had escaped or had signed submissions to the government; the convicted Weigel was probably insane and Mitchell is put down by the historian of the Rebellion as a simpleton. See Baldwin, *op. cit. supra*, p. 264.

Grier's charge in the Hanway case, as quoted in the text, suggests in part that the intent requisite to make out treason is not shown if it appears that defendants regarded a resort to force as necessary in defense against what they in good faith believed to be an unlawful threat of violence under color of authority. This seems also to be the view suggested by Governor Ford, of Illinois, in his comment upon the dubious character of the charge of treason under which the Mormon leader, Joseph Smith, was arrested in that state in 1844:

The overt act of treason charged against them consisted in the alleged levying of war against the State

18th century English authorities, sufficient overt acts might have been shown: witness the railroad strike riots of 1877, the Haymarket affair of 1886, Coxey's Army, and the Pullman strike in 1894.<sup>108</sup>

by declaring martial law in Nauvoo, and in ordering out the legions to resist the *posse comitatus*. Their actual guiltiness of the charge would depend upon circumstances. If their opponents had been seeking to put the law in force in good faith, and nothing more, then an array of military force in open resistance to the *posse comitatus* and the militia of the State, most probably would have amounted to treason. But if their opponents merely intended to use the process of the law, the militia of the State, and the *posse comitatus*, as cats-paws to compass the possession of their persons for the purpose of murdering them afterwards, as the sequel demonstrated the fact to be, it might well be doubted whether they were guilty of treason.

Ford, History of Illinois (Chicago, 1854) 337. Here again, obviously, it would be the intent and not the act element of the offense which would be the defendants' bulwark.

<sup>108</sup> There seems to be no evidence that any stronger measures than the use of Federal troops were considered in connection with the 1877 riots. In view of the broad construction of "conspiracy" used to convict the leaders in the Haymarket meeting, it is notable that no charge of treason was attempted. See *Spies v. People*, 122 Ill. 1, 12 N. E. 865 (1887); The Trial of the Chicago Anarchists, 12 American State Trials (Lawson, ed. St. Louis 1920) 1; David, History of the Haymarket Affair (N. Y. 1936) Ch. XIV. The *Spies* decision was declared by (1887) 18 Weekly Law Bull. 326, 327 to be "the most portentous and dangerous . . . ever pronounced by a court of justice in the United States", because "the theories laid down in the Chicago case are essentially the exploded idea of constructive treason revived and applied to the crime of murder." Whatever the pacific protestations of its organisers, Coxey's "petition in boots" was the sort of mass movement on the

It seems a fair statement that, as a matter of practical construction, the crime of treason by levying war has been restricted here as perhaps in England, to the offense which the words *prima facie* describe—a direct effort to overthrow the government, or wholly to supplant its authority

legislature which earlier English doctrine would almost certainly have regarded as within the scope of constructive levying of war; but, despite real official concern for the dangerous potentialities of the movement, the only prosecutions which eventuated were for the misdemeanors of unlawful parading on the Capitol grounds and trampling the grass. See *McMurry, Coxey's Army* (Boston, 1929), 104-106, 116, 123. The value of fastening a serious criminal charge on the leadership of the "Pullman" strike both as a matter of influencing public opinion and breaking the morale of the strikers was fully appreciated by the government, which, yet, relied on a conspiracy charge rather than the more intimidating accusation of treason; and there seems to be no evidence that the possibility of the latter was considered. See *Lindsey, The Pullman Strike* (Chicago, 1942) Ch. XII, and pp. 276, 278, 279, 280; cf. *Consolidated Coal & Coke Co. v. Beale*, 282 Fed. 934, 936 (S. D. Ohio, 1922). Any theory of constructive levying of war was conspicuously absent in strong charges delivered to Grand Juries in connection with the strike. See 62 Fed. 828 (N. D. Ill. 1894); *id.*, 834 (S. D. Cal. 1894); *id.*, 840 (N. D. Cal. 1894).

There are numerous dicta through the Civil War period, that the effort by force to prevent the general execution of a single law is a levying of war. See *Charge to Grand Jury*, by Story, Circ. J., Fed. Cas. No. 18,275, 30 Fed. Cas. 1046, 1047 (Circ. Ct. D. R. I. 1842); charge to Grand Jury by Sprague, D. J., Fed. Cas. No. 18,263, 30 Fed. Cas. 1015 (D. Mass. 1851); charge to Grand Jury by Nelson, Circ. J., Fed. Cas. No. 18,261, 30 Fed. Cas. 1007, 1012 (Circ. Ct. S. D. N. Y. 1851); charge to Grand Jury by Kane, D. J., Fed. Cas. No. 18,276, 30 Fed. Cas. 1047, 1048 (Circ. Ct.

in some part or all of its territory.<sup>109</sup> In terms of doctrine, this amounts to limiting the scope of the crime by insistence upon the showing of a carefully defined intention. That it is the intent and not the act element which expresses the limitation of the crime is reflected by the one episode in which a broader use was attempted of the charge of levying war. Following the Homestead Riot of 1892, several of the strike leaders were indicted for levying war against the state of Pennsylvania, after the Grand Jury had been charged by the Chief Justice of the state that

A mere mob, collected upon the impulse of the moment, without any definite object beyond the gratification of its sudden passions, does not commit treason, although it destroys property and takes human life. But when a large number of men arm and organize themselves by divisions and companies, appoint officers and engage in a common purpose to defy the law, to resist its officers, and to deprive any portion of the fellow-citizens of the rights to which they are entitled under the Constitution and

---

E. D. Pa. 1851); charge to Grand Jury by Curtis, Circ. J., Fed. Cas. No. 18,269, 30 Fed. Cas. 1024, 1025 (Circ. Ct. D. Mass. 1851); *U. S. v. Greiner*, Fed. Cas. No. 15,262, 26 Fed. Cas. 36, 39 (E. D. Pa. 1861); charge to jury by Field, Circ. J., in *U. S. v. Greathouse*, Fed. Cas. No. 15,254, 26 Fed. Cas. 18, 22 (Circ. Ct. N. D. Cal. 1863); charge to Grand Jury, In re Riots of 1844, 4 Pa. Law. Jour. Rep. 29, 35 (Phila. Quar. Sess. 1844), also quoted at 26 Fed. Cas. 116; *Druecker v. Salomon*, 21 Wis. 621, 626 (1867).

<sup>109</sup> Cf. S. Holdsworth, H. E. L. (2d ed. Cambridge, 1937) 320, 328-329; Kenny, Outlines of Criminal Law (15th ed. Cambridge, 1936) 315.



laws, it is a levying of war against the state, and the offense is treason.<sup>110</sup>

These, as well as other charges, were quietly dropped subsequent to the acquittal of three of the men in prosecutions for murder growing out of the encounter with the Pinkerton men.<sup>111</sup> Significantly, the resort to the treason charge met with prompt and unanimous criticism from conservative professional sources. This ranged from the polite doubts of the *Albany Law Journal* to the biting commentary of the *American Law Review*, which found the indictment

a mass of stale, medieval verbiage, drawn seemingly from some old precedent not dating later than the reign of William and Mary,

and which declared that the charge of Mr. Justice Grier, in the *Hanway* case,

disposes of any attempt to raise to the grade of treason the act of a lot of half-starved mechanics, or their governing committee, where they are organized into a society, in taking unlawful measures to coerce their employer into compliance with their demands. The object is not to bring about any *political change* whatever, but to subject a party to an intended contract to a species of *duress*, such as will compel him to enter into a contract determined upon by the members of the unlawful combination. It is undoubtedly an unlawful

<sup>110</sup> Paxson, C. J., in *Commonwealth v. O'Donnell*, 12 Pa. Co. 97, 104-105 (O. & T. Allegheny Cty. 1892).

<sup>111</sup> See Burgoyne, *Homestead* (Pittsburgh, 1893) 294; Stowell, "Fort Frick" or the Siege of Homestead (Pittsburgh, 1893). 291.

conspiracy, provided it has in contemplation the attainment of its object by unlawful means \* \* \*. But it is the wildest dream to dignify such a conspiracy with the name of treason.<sup>112</sup>

The character of the intention, rather than any difference in the overt acts, marks the line between riot and treason by levying war.<sup>113</sup> It is significant of the practical, restrictive force of the intent requirement, that hardly a score of the approximately 250 cases on riot or unlawful assembly listed in the American Digest System since 1787 involve prosecutions for disturbances arising out of issues of a public rather than a private character. It is likewise significant that most of these "public issue" riots could probably have been fitted within the crime of levying of war as it had been developed by construction before 1787.<sup>114</sup> The meaningful relation between the his-

<sup>112</sup> (1892) 26 Am. L. Rev. 912, 914; cf. (1892) 46 Alb. L. Jour. 345; (1892) 31 Am. L. Reg. (n. s.) 691, 699; (1893) 15 Crim. L. Mag. 191, 197. Former Chief Justice Agnew, of Pennsylvania, is quoted (Burgoyne, 202 and Stowell, 258, *op. cit. supra*, note 111) as stating in a letter to the press that

It is easy to distinguish treason from riot. It lies in the purpose or intent of the traitor to overthrow the government or subvert the law or destroy an institution of the state. Riot is a breach or violation of law, but without a purpose against the state.

<sup>113</sup> See Seagle, "Riot", 13 Enc. Soc. Sci. (N. Y. 1934) 388.

<sup>114</sup> In *Pennsylvania v. Cribbs*, Add. 277 (Pa.: Westmoreland Cty. Ct., 1795) an attempt to tax and feather the Federal commissioners sent to adjust the controversy involved in the "Whiskey Rebellion" was treated as riot. Cf. *Pennsylvania v. Morrison*, Add. 274 (Allegheny Cty. Ct. 1795).

tory of the riot and treason cases is implicit in the recent ruling of the Supreme Court of Utah in *State v. Solomon*. Defendants had been convicted of participation in a riot over the admin-

(raising a Liberty Pole in disaffected area during visit of Federal commissioners; offense not specified). Even prior to the Fugitive Slave Law, efforts to rescue fugitive slaves by force from their masters were charged as riots, though in some instances at least the intent was probably broadly directed against the institution of slavery rather than representing a concern for the particular Negro involved. *State v. Connolly*, 3 Rich. L. 337 (So. C. 1832); *Clellans v. Commonwealth*, 8 Pa. St. (8 Barr) 223 (1848); cf. The Trial of the Rev. Jacob Gruber, 1 American State Trials (Lawson, ed. St. Louis 1914) 69 (Frederick Cty. Ct., Md. 1819) (inciting slaves to insurrection). It is notable that the Fugitive Slave Law itself created a specific offense to cover such attempts. 9 Stat. 462. Vigilantism has been treated as riot, though it represents an unlawful effort to supplant the constituted enforcement authorities. See *Crawford v. Ferguson*, 5 Okla. Cr. App. 377, 115 Pac. 278 (Okla. Ct. Crim. App. 1911). In *Commonwealth v. Jenkins*, Thacher Crim. Cas. 118, 12 American State Trials, *op. cit. supra*, (Boston Municipal Ct. 1825) 488, an effort to pull down all brothels was charged to be a riot. Forceful efforts to deprive certain racial, religious, or political groups in the community of the protection of the law have been prosecuted as riots. Charges to Grand Jury In re Riots of 1844, 2 Pa. Law Jour. Rep. (Clark) 135, 275 (Quarter Sess. and Oyer & Terminer, Philadelphia City and Cty. Ct. 1844); *Shouse v. Commonwealth*, 5 Pa. St. (5 Barr) 83 (1847). ("Know Nothing" clashes with the Irish); The Trials of Winthrop S. Gilman and John Solomon, and others, for Riot, 5 American State Trials, *op. cit. supra*, pp. 528, 589 (Alton Municipal Ct. 1838) (suppression of Abolitionist agitation—the Lovejoy riot); *Bradford v. State*, 40 Tex. Cr. 632, 51 S. W. 379 (Tex. Cr. App. 1899) (against employment of Mexican labor); *Bolin v. State*,

istration of "relief". The demonstration giving rise to the disturbance seems probably to have been Communist-organized. The district attorney in effect sought to give the prosecution the atmos-

193 Ind. 302, 139 N. E. 659 (1923) ("the Hunkies must go"); cf. *Commonwealth v. Daly*, 2 Pa. Law Jour. Rep. (Clark) 361 (Quarter Sess. City and Cty. of Philadelphia, 1844) and *Commonwealth v. Hagg*, id. 467 (1844) (prosecutions for murder growing out of the Know Nothing riots); *People v. Judson*, 11 Daly 1 (N. Y. Com. Pleas 1849) (anti-English riot over the actor Macready; 23 persons killed in clash with militia). And the theory under which the "civil rights" statutes were sought to be applied to the Ku Klux Klan was that of ordinary conspiracy to violate the laws rather than that of constructive treason. See *The Trials of Members of the Ku Klux Klan*, 9 American State Trials, *q. cit. supra*, p. 593, ff. (Circ. Ct. D. So. C. 1871). Compare the cautiously restricted construction of statutory offenses of conspiracy to prevent by force the execution of the laws, as attempted to be applied against efforts to coerce certain classes of the population, in *Baldwin v. Franks*, 120 U. S. 678 (1887) [but cf. *Deady*, D. J. In re Impaneling and Instructing the Grand Jury, 25 Fed. 749, 754 (D. Ore. 1886)] (Chinese), and *Haywood v. U. S.*, 268 Fed. 795 (C. C. A. 7th, 1920) (coercion on government contractors). Extreme denunciation of organized government in public meetings has been treated as riot or unlawful assembly. *People v. Most*, 55 Hun 609, 8 N. Y. Supp. 625 (N. Y. Sup. Ct. 1890), *aff'd*, 128 N. Y. 108, 27 N. E. 970 (1891). Cf. *People v. Most*, 171 N. Y. 423, 64 N. E. 176 (1902); *Commonwealth v. Frishman*, 235 Mass. 449, 126 N. E. 838 (1920). Demonstrations to influence the conduct of "relief" policy, eventuating in disturbances which probably were calculated, were prosecuted as riot or unlawful assembly in *People v. Dusan*, 1 Cal. App. (2d) 556, 36 P. (2d) 1096 (Cal. App. 1934); *Commonwealth v. Egan*, 113 Pa. Super. 375, 173 At. 764 (Super. Ct. Pa. 1934); *State v. Solomon*, 93 Utah 70, 71 P. (2d) 104

phere of a treason trial, when in his speech to the jury he emphasized that

The riot charged here is not an ordinary riot; *it is a riot against your government* \* \* \* because a riot took place

(1937), 96 Utah 500, 87 P. (2d) 807 (1939), note 115, *infra*; *State v. Moe*, 174 Wash. 303, 24 P. (2d) 638 (1933). Forcible efforts to prevent execution of process against debtors' property were treated as riot, though they took on the character of attempts to establish general policy rather than merely sympathetic efforts in behalf of particular distressed individuals. See Skilton *op. cit. supra*, note 105; *Commonwealth v. Frankfeld*, 173 At. 834 (Pa. Super. Ct. 1934); *State v. Woolman*, 84 Utah 23, 83 P. (2d) 640 (1934); *State v. Frandsen*, 176 Wash. 558, 30 P. (2d) 371 (1934). Demonstrations to influence the conduct of foreign policy, eventuating in breaches of the peace probably foreseen and intended, were prosecuted as riot in *Commonwealth v. Spartaco*, 104 Pa. Super. 1, 158 At. 623 (Pa. Super. Ct. 1932) and *Commonwealth v. Kuhn*, 116 Pa. Super. 28, 176 At. 242 (Pa. Super. Ct. 1935). *Commonwealth v. Paul*, 21 At. (2d) 421 (Pa. Super. Ct. 1941) treated as riot what seems probably an attempt by force to prevent technological change. There are of course many cases in which breaches of the peace occurring in the course of labor disputes, usually arising out of picketing, have been prosecuted as riot. The abortive indictments for levying of war in the Homestead Strike (note 110, *supra*) seem to be the only attempt to use the law of treason to suppress labor conflict. That a "strong" prosecutor might have found a rationalization for this effort which Paxson, C. J. overlooked, is implied in the suggestion in (1892) 31 Am. L. Reg. (n. s.) 691, 700, that it would be treason if strike violence were shown to be intended to enforce a general public policy of collective bargaining. And *Ex parte Jones*, 71 W. Va. 567, 77 S. E. 1029 (1913), over a strong dissent by Robinson, J., employs a rationale derived in part from the broader authorities on "levying war" to



against the officers who were there to enforce the laws of the United States which we should honor and respect, and that is why I said, as I did, this isn't an ordinary riot case; and I want to say to you, my friends, this riot didn't commence on the 21st day of August. Technically this was the day when the scheme came into action, that is when they carried it into effect, and I say to you, gentlemen of the jury, that if we are to permit these schemes, maybe by people who have been misinformed; but, if we are to permit these schemes to get into action, as happened in this case, and if we let these acts go and condone them, I am telling you, my friends, that we will be in rather a serious situa-

sustain the validity of detention of rioters for trial by military tribunals. The decision is not now regarded as sound authority. See Fairman, *Law of Martial Rule* (Chicago, 1943) 168-170. That careful definition of the scope of "riot" is necessary to protect a social interest in free speech and a desirable play of competitive claims, see *State v. Russell*, 45 N. H. 83, 85 (1863); *People v. Edelson*, 169 Misc. 388, 7 N. Y. Supp. (2d) 323 (Kings Cty. Ct. 1938).

For clarity, it is desirable to repeat that the recitation of the foregoing cases is not intended to suggest that in any of them should the prosecution have been for "treason"; quite the contrary. But most of them could have been colorably brought within the 17th and 18th century English precedents as to what constituted levying of war. And since most of them obviously boil up out of tense public situations, the entire absence of any suggestion or attempt to employ the treason charge indicates that the broader reaches of the crime of levying war have been so thoroughly buried under different conceptions of public policy as to make it a clear abuse of power to seek to revive them.



tion as far as our government is concerned.

I am making these preliminary remarks to you in the hope of getting you to sense, as I think you do, the importance of this case.

\* \* \* I have no personal enmity toward any of them at all, but, gentlemen of the jury, *when they adopt and approve the philosophy they have done, and endeavored to carry them into operation as they did endeavor to do in this case, that is when I part company with them, and that is when I say they should be penalized for their acts.* \* \* \*

The Supreme Court of Utah reversed the convictions on the ground that the district attorney had thus imported into the case something which the evidence in a prosecution for riot did not justify:

That the challenged words were outside the evidence is clear. There was no evidence that this riot was against the government of the United States or the officers of the United States government. In fact the charge in the information and the evidence offered by the State showed merely that the defendants were, at most, concertedly disturbing the peace and quiet of certain persons in the relief headquarters by the use of or threats of use of violence toward such of them individually as blocked their path. Then again the argument that "*this riot did not commence on the 21st day of August*" and its designation as a *scheme* amounts to an argument that this riot had been planned and plotted some time before as a riot, uprising or rebellion against the government of the United States without

any pleading, claim or evidence to that effect. But the argument went on to say that if these things were not punished, "*we would be in a serious situation as far as our government is concerned.*" (Italics added). The argument then savors of the idea that the case is important because defendants have adopted a certain philosophy. Couple such argument with the fact that after the naturalization examiner came in and sat beside the district attorney, the State had recalled one of defendants, Dave Sinclair (touched on later herein), and further cross-examined him on a wholly immaterial matter, his citizen or alien status, to show he was an alien, and the argument becomes poison. The argument is an appeal to prejudice and passion—an argument that defendants were aliens scheming to embarrass, and endanger, if not to overthrow the government. It was highly improper, prejudicial and presumptively detrimental to defendants' legal rights \* \* \*. Appeals to political, racial or religious prejudice or passion are always improper and in cases such as this where no political question was even remotely connected with the charge, the misconduct of the district attorney and the palpable error of the trial court in its rulings thereon were departures so far from that which is proper or legal as to necessitate a reversal of the verdict and judgment.<sup>115</sup>

There are some indications of similar resort to a careful definition of specific intent, to check the dangerously vague potentialities of the charge

<sup>115</sup> 96 Utah 500, 503, 504-505, 87 P. (2d) 807, 808, 808-809 (1939); cf. s. c., 93 Utah 70, 71 P. (2d) 104 (1937).

of conspiracy to obstruct the execution of the laws.<sup>116</sup>

<sup>116</sup>Because of the vague scope of the crime, the definition of "conspiracy" presents problems analogous to those met with in the law of treason, concerning a fair balance between protection of public security and of the individual against oppressive prosecution. The most precise analysis of the problem stresses the critical importance of a careful definition of the intent element, as the most practical safeguard for individual liberty. See Harno, *Intent in Criminal Conspiracy* (1941) 89 U. Pa. L. Rev. 624, 646: •

Owing to the elasticity of the crime and its vague boundaries, there can be no doubt that it presents serious potential dangers of abuse. The view is here advanced that these dangers would tend to be reduced once the basic principles of the crime and particularly the role of the intent element in it are fully understood. The gist of the crime lies not, as has often been said, in the agreement. The agreement is a factor, but it is no more than that. The gist of the crime is in the intent. It may be true that the possibilities for mischief are heightened through a number of individuals, as distinguished from one individual acting separately, uniting in a common design, but the grave danger lurks; nevertheless, in the intent of the confederates.

The impression seems to be current, as Judge Learned Hand has pointed out, that once a criminal concert is established, all are liable for everything one of the participants has done, and that prosecutors, \* \* \* can sweep into the drag-net of conspiracy all those who have associated in any degree in the enterprise. There is peril, indeed, to the individual and to the public in that attitude, and there is peril, also, in the inherent vagueness in the definition of the crime. But bad practices can be discouraged and the dangers associated with the crime can be allayed if the courts will with regularity enforce the injunctions of the law

Decisions concerning adherence to the enemy are as few as those regarding the levying of war, but this fact in itself makes more striking the care with which judges have sought to define the

of conspiracy in accordance with its basic principles. Conspiracy is an inchoate crime for which the essential act is slight. It involves an intent to commit a further act. It is the commission of that act which the state desires to prevent, and it is with the intent to commit that act that the state is concerned. The essence of the crime thus lies in the intent.

The practical protection afforded against a finding of "guilt by association", by insistence upon a showing that any given defendant shared the specific intent to commit the plotted crime is shown in *U. S. v. Bryant*, 245 Fed. 682 (N. D. Texas 1917), *aff'd*, 257 Fed. 378 (C. C. A. 5th, 1919), 40 Sup. Ct. 117 (1920). Commenting on the jury's acquittal of several co-defendants whom the Circuit Court of Appeals regarded as apparently no less guilty than those convicted, that court said,

The jury acquitted all but the three plaintiffs in error, and by so doing, found against the conspiracy, so far as its scope included the order as an organization, only implicating its officers. The fair inference to be drawn from the verdict is that the jury believed that the plaintiffs in error had formed an inner conspiracy, the purpose of which was to use the machinery of the order to resist any draft law that might be enacted, even to the extent of overthrowing the government, if necessary, and to accomplish this by overcoming the conservatism of the majority and committing them to their own views.

257 Fed. 384. So, also, a strict and precise construction of the intent element in the general federal conspiracy statute was the instrument employed to prevent a dangerously vague extension of the crime in *Haywood v. U. S.*, 268 Fed. 793, 799-800 (C. C. A. 7th, 1920) *cert. den.*, 256 U. S. 689, 65

requisite intention in order to protect the innocent. The most illuminating treatment of the point is in *United States v. Pryor*. There Washington, Circuit Justice, in effect directed a verdict,

L. Ed. 1172, 41 Sup. Ct. 449. That case held that forcible interference by a labor organization with the operations of producers from whom the government expected to buy, or had contracted to buy, war supplies was not a conspiracy "by force to prevent, hinder, or delay the execution of any law of the United States" within the statute:

How are the laws of the United States executed? By officials upon whom the duty is laid. Performance of that duty cannot be delegated. Producers who have contracts to furnish the Government with supplies, are not thereby made officials of the government. Defendants' force was exerted only against producers in various localities. Defendants thereby may have violated local laws. With that we have nothing to do. Federal crimes exist only by virtue of federal statutes; and the law makers owe the duty to citizens and subjects of making unmistakably clear those acts for the commission of which the citizen or subject may lose his life or liberty. Section 6 should not be enlarged by construction. Its prima facie meaning condemns force only when a conspiracy exists to use it against some person who has authority to execute, and who is immediately engaged in executing a law of the United States.

The decision in *Baldwin v. Franks*, 120 U. S. 678, 30 L. Ed. 766, 7 Sup. Ct. 656 (1887), (conspiracy to drive out Chinese residents lawfully in the United States under treaty), proceeds on the same rationale of interpretation, though the application seems erroneous. See Field J., dissenting, *id.* 703-705; Deady D. J. in *In re Impaneling and Instructing the Grand Jury* 26 Fed. 749, 754 (D. Ore. 1886).

partly because the evidence did not show specific treasonable intent. Defendant, who had been taken prisoner by the British squadron blockading the Delaware in 1814, sought to ransom himself and his fellows by going ashore with a British party under a flag of truce to help them purchase provisions. The court instructed the jury that the act of going ashore under a flag of truce was not a sufficient overt act, not because it failed to evidence intent, but because it was not an act sufficiently far advanced in execution of the intent. But, Mr. Justice Washington indicated that the existence of a specific intent to betray would affect the determination of what was a sufficiently advanced act to be an "overt act",—clearly, because some intents are more dangerous than others and hence the law should take earlier preventive steps against those holding them. Here there was a flag of truce and "no act of hostility was attempted, nor is there the slightest reason to believe that any was meditated by the prisoner, or by any of the party." In these circumstances,

All rests in intention merely, which our law of treason in no instance professes to punish. Carrying provisions towards the enemy, with intent to supply them, though this intention should be defeated on the way, would be very different from the act of going in search of provisions for such a purpose, and stopping short before any thing was effected, and whilst all rested in intention \* \* \*

But, if the intention of the prisoner was to procure provisions for the enemy, by



uniting with him in acts of hostility against the United States or its citizens, which is chiefly pressed against him by the district attorney; then, indeed, it must be admitted, that his progressing towards the shore, was an overt act of adhering to the enemy, although no act of hostility was in fact committed \* \* \* \* \*

In charges of adhering, as in those of levying war, though the mere fact of mixed motives will not negative guilt, the opinions have carefully instructed that the defendant must have in mind more than the purpose of aiding the particular individual with whom he deals: i. e., translated into the terms familiar in charges of levying war, he must be shown to have acted from a "public" purpose and not a particular or private one. Thus in *United States v. Fricke*, where the overt acts included the holding of funds and the borrowing of money for the use of a known enemy agent, Judge Mayer cautioned that

If not satisfied beyond a reasonable doubt that the defendant's intention and purpose in acting as he did was evil—that is, if not satisfied beyond a reasonable doubt that he intended to aid and comfort the enemies of the United States—and if not satisfied that that was his object, the defendant must be found not guilty.

And he pointed up this injunction by the example, that it would not be treason to give or

<sup>117</sup> Fed. Cas. No. 16,096; 27 Fed. Cas. 628, 630, 631 (Circ. Ct. D. Pa. 1814). And compare the acquittal of Joshua Hett Smith, for lack of convincing proof of treasonable intent. Note 83, *supra*.

lend money to a former employee who had been discharged in wartime because of his enemy alien nationality, where there was no evidence that the purpose was anything but to help the man out of straitened circumstances.<sup>18</sup> In *United States v. Stephan*, in instructions subsequently approved by the Circuit Court of Appeals, the trial judge told the jury that

The element of intent is of first importance in every criminal case. \* \* \* Intent is the meat of the crime, and it is the meat of this crime.

and dealt carefully with the issue presented by defendant's contention that in aiding the escape of a German prisoner of war, he had acted only out of sympathy for the individual:

Of course if one were doing something such as buying food for his wife, and you were satisfied that they were lawfully married and he loved his wife, it would be hard to make you think that he was trying to help the enemy; but suppose the facts are different and you didn't find any reason why the assistance should be given except that he loved the other country better than he did his own, then the jury would take those facts and all of the facts into consideration in determining the real intent.

<sup>18</sup> 259 Fed. 673, 676, 682 (S. D. N. Y. 1919).

<sup>19</sup> 20 Fed. Supp. at 744, note; charge approved, 133 F. (2d) 87, 99 (C. C. A. 6th, 1943). Unless it is to be interpreted as applying the familiar rule that mere likelihood of mixed motive will not negative existence of the intent, a passage in the opinion in *U. S. v. Cramer*, 137 F. (2d) 888, 893 (C. C. A. 2d, 1943) might seem to go

Obviously, the language of some of these opinions confuses "motive" with "intent", but this very emphasis underlines the courts' anxiety that no one be found to have a treasonable intention merely on the basis of inference and innuendo. As has been suggested, the critical fact in all these situations was the accused's knowledge that he was dealing with an enemy.

The foregoing discussion suggests that the restrictive policy of the treason clause of the Constitution may be satisfied without requiring the showing of an overt act which in itself embodies both the intent and the act elements of the crime, or which at least is some evidence of intent. The constitutional policy is compounded of a limiting beyond the limits of a proper charge on intent as the policy thereon is reflected in other opinions:

When one's country, though adopted, is at war, one cannot, without risk of conviction of giving aid and comfort to the enemy, freely associate even with old friends or assist them even in comparatively small ways, as by banking their funds or intermediating with others for them—once one knows or reasonably suspects them to be here in the role of illegal invaders, whether armed physically or with the more modern, but nonetheless destructive weapon of propaganda.

This might appear to cast on the defendant the burden of proving his innocence, rather than on the prosecution that of proving his guilt. But, the significant emphasis on defendant's knowledge or reasonable suspicion that he was dealing with an enemy agent indicates that the court is merely pointing out that, in view of that knowledge, defendant in fact had the specific intention of aiding the enemy; and that the further question of motive is immaterial.

definition of the scope of the offense and an evidentiary requirement. The scope limitation seems to have two objects: the first, to protect the innocent against the attribution of a treasonable intent by secondary or more remote inferences; the second, to protect the individual and the community interest in the free exchange of ideas and peaceful advocacy of policies concerning community affairs. Both as a matter of logic and of history, the first object seems properly protected by a careful definition calling for the showing of specific intent, the second by strict insistence that defendant be shown to have moved further into the stage of execution of ideas than is involved in their mere expression or even advocacy. The evidentiary requirement is in terms linked to proof of the act element, which seems, *prima facie*, to give as much basis for interpreting its scope in the light of the element it is designated to prove as for the reverse process. There is no substantial historical evidence to suggest that the two-witness requirement imports into the act element the function of demonstrating or corroborating intention.

